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Date: 11 July 2014

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public document

Judgment
on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda"

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Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Jean Flamme

REGISTRY

Registrar
Mr Herman von Hebel

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II entitled "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda" of 17 March 2013 (ICC-01/05-01/13-261),

After deliberation,

By majority, Judge Erkki Kourula and Judge Anita Ušacka dissenting,

Delivers the following

JUDGMENT

The "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda" is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be "the most serious crimes of concern to the international community as a whole".

2. The Appeals Chamber considers that any decision on whether a person is detained pending his or her trial at this Court ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court. Personal circumstances of the suspect such as the suspect's education, professional or social status may be relevant to assessing under article 58 (1) (b) (i) of the Statute whether or not a suspect will appear before the Court.

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II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 19 November 2013, the Prosecutor filed the "Prosecution's Application for Warrant of Arrest"[1] (hereinafter: "Application for Warrants of Arrest"), seeking a warrant for the arrest of, *inter alia,* Mr Jean-Jacques Mangenda Kabongo (hereinafter: "Mr Mangenda").[2]

4. On 20 November 2013, Pre-Trial Chamber II (hereinafter: "Pre-Trial Chamber") issued the "Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO"[3] (hereinafter: "Arrest Warrant Decision").

5. Following his surrender to the Court, Mr Mangenda first appeared before the Pre-Trial Chamber on 5 December 2013.[4] He has been in detention at the Court since.

6. On 8 January 2014, Mr Mangenda filed his "Application for release"[5] (hereinafter: "Application for Interim Release"), requesting, *inter alia*, that the Pre-Trial Chamber (i) order his immediate release; or, in the alternative (ii) order his interim release.[6]

7. On 9 January 2014, the Pre-Trial Chamber, its functions being exercised by Judge Cuno Tarfusser acting as single judge,[7] rendered the "Decision requesting observations on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda"[8] (hereinafter: "Decision Requesting Observations"), *inter alia*, inviting submissions on the Application for Interim Release from the Prosecutor, as well as the relevant authorities of The Netherlands and of the United Kingdom.[9]

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[1] ICC-01/05-01/13-19-Conf.
[2] Application for Warrants of Arrest, para. 1.
[3] ICC-01/05-01/13-1-US-Exp-tENG. A redacted version of the French original version of the warrant of arrest (ICC-01/05-01/13-1-US-Exp) was filed on 28 November 2013 as ICC-01/05-01/13-1-Red2.
[4] *See* "Decision convening a hearing for the first appearance of Jean-Jacques Mangenda and related issues", 4 December 2013, ICC-01/05-01/13-29, p. 3; Transcript of 5 December 2013, ICC-01/05-01/13-T-3-Red-ENG (WT), p. 1, line 1, p. 3, lines 6 to 17.
[5] ICC-01/05-01/13-71-tENG.
[6] Application for Interim Release, p. 20.
[7] *See* Transcript of 27 November 2013, ICC-01/05-01/13-T-1-ENG (CT WT), p. 3, line 22, to p. 4, line 2.
[8] ICC-01/05-01/13-73.
[9] Decision Requesting Observations, p. 5.

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8. On 29 January 2014, the Registrar filed the "Rapport du Greffe sur la Requête de mise en liberté de Mr Mangenda Kabongo"[10] (hereinafter: "Registry Report"), communicating to the Pre-Trial Chamber the observations he had received on 24 January 2014 from the authorities of the United Kingdom (hereinafter: "UK Authorities' Observations"),[11] as well as the observations he had received on 27 January 2014 from the authorities of The Netherlands.[12]

9. On 17 March 2014, the Pre-Trial Chamber rendered the "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda"[13] (hereinafter: "Impugned Decision"), rejecting the Application for Interim Release.[14]

B. Proceedings before the Appeals Chamber

10. On 20 March 2014, Mr Mangenda filed the "Requête d'Appel de la décision du 17 mars 2014 du Juge unique de la Chambre Préliminaire II sur la requête de mise en liberté de Jean-Jacques KABONGO MANGENDA en application de l'art. 82.1.b du Statut de Rome"[15] (hereinafter: "Notice of Appeal").

11. In his Notice of Appeal, Mr Mangenda requested, *inter alia*, extensions of time and page limits for his document in support of the appeal.[16] Upon an order from the Appeals Chamber of 21 March 2014,[17] the Prosecutor filed on the same day the "Prosecution opposition to the Mangenda Defence's request for time and page limit extensions to file its appeal"[18] (hereinafter: "Response to Mr Mangenda's Requests") in which she opposed Mr Mangenda's requests.[19]

12. On 21 March 2014, the Appeals Chamber rendered the "Decision on Mr Jean-Jacques Mangenda Kabongo's requests for time and page limit extensions for his

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[10] Dated 28 January 2014 and registered on 29 January 2014, ICC-01/05-01/13-137.
[11] *See* Registry Report, ICC-01/05-01/13-137-AnxIII.
[12] *See* Registry Report, ICC-01/05-01/13-137-Conf-AnxIV.
[13] ICC-01/05-01/13-261.
[14] Impugned Decision, p. 19.
[15] ICC-01/05-01/13-277 (OA 4).
[16] Notice of Appeal, para. 3.
[17] "Order on the filing of a response by the Prosecutor to Mr Jean-Jacques Mangenda Kabongo's requests for an extension of the time and page limits for his document in support of the appeal", ICC-01/05-01/13-281 (OA 4).
[18] ICC-01/05-01/13-282 (OA 4).
[19] Response to Mr Mangenda's Requests, paras 1-3.

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document in support of the appeal"[20] (hereinafter: "Decision of 21 March 2014"), rejecting Mr Mangenda's requests.[21] The reasons for this decision are given below.

13. On 24 March 2014, Mr Mangenda filed his "Appeal Brief"[22] (hereinafter: "Document in Support of the Appeal").

14. On 31 March 2014, the Prosecutor filed the "Prosecution's response to the Mangenda Defence's appeal against the Single Judge's Decision to continue his detention"[23] (hereinafter: "Response to the Document in Support of the Appeal").

III. REASONS FOR THE DECISION OF 21 MARCH 2014

15. In his Notice of Appeal, Mr Mangenda requested an extension of the page limit of the Document in Support of the Appeal, noting that the Impugned Decision is 19 pages long and arguing that his appeal raises fundamental points of law that have not yet being developed by the Court.[24] In his submission, this constitutes exceptional circumstances justifying the request.[25] He further requested an extension of the time limit for the filing of the Document in Support of the Appeal without advancing any reasons in support of this request.[26]

16. In response, the Prosecutor argued that Mr Mangenda's argument in relation to the request for an extension of the page limit did not meet the "'exceptional circumstances' threshold" of regulation 37 (2) of the Regulations of the Court.[27] In relation to the request for time extension, the Prosecutor noted that Mr Mangenda offered no reason as to why his request for extension of time met the "'good cause' requirement" set out in regulation 35 (2) of the Regulations of the Court.[28]

17. In its Decision of 21 March 2014, the Appeals Chamber rejected the requests for extensions of the page and time limits for the reasons that follow.[29] As to his request for an extension of the page limit, regulation 37 (2) of the Regulations of the

[20] ICC-01/05-01/13-286 (OA 4).
[21] Decision of 21 March 2014, p. 3.
[22] ICC-01/05-01/13-288-tENG (OA 4). The English translation of the Document in Support of the Appeal was filed on 5 June 2014.
[23] ICC-01/05-01/13-301 (OA 4).
[24] Notice of Appeal, para. 3, p. 4.
[25] Notice of Appeal, para. 3, p. 4.
[26] Notice of Appeal, para. 3, p. 4.
[27] Response to Mr Mangenda's Requests, para. 2.
[28] Response to Mr Mangenda's Requests, para. 3.
[29] Decision of 21 March 2014, p. 3.

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Court provides that "[t]he Chamber may, at the request of the participant, extend the page limit in exceptional circumstances". The Appeals Chamber considered that Mr Mangenda did not establish that, in the case at hand, such "exceptional circumstances" existed. The Appeals Chamber observed that apart from noting the length of the Impugned Decision and arguing generally that the issues to be raised in his appeal were complex, he did not demonstrate why the page limit of 20 pages was insufficient.

18. Turning to the request for extension of the time limit, the Appeals Chamber recalled that regulation 35 (2) of the Regulations of the Court stipulates that "[t]he Chamber may extend or reduce a time limit if good cause is shown". The Appeals Chamber found that Mr Mangenda did not establish good cause as he did not provide any reasons in support of his request.

IV. PRELIMINARY ISSUE

19. The Prosecutor submits that the Document in Support of the Appeal includes, on average, more than 395 words per page, which violates regulation 36 of the Regulations of the Court and circumvents the Decision of 21 March 2014, in which the Appeals Chamber rejected Mr Mangenda's request for an extension of the page limit.[30]

20. The Appeals Chamber notes that regulation 36 (1) of the Regulations of the Court provides that "[h]eadings, footnotes and quotations shall be counted in calculating the pages limits". Regulation 36 (3) of the Regulations of the Court stipulates that "[a]n average page shall not exceed 300 words". The Appeals Chamber notes that the French version of the Document in Support of the Appeal is 20 pages long[31] and each page contains, on average, 393 words, which significantly exceeds the average of 300 words per page established by regulation 36 (3) of the Regulations of the Court. Thus, as noted by the Prosecutor, the Document in Support of the Appeal is in breach of regulation 36 of the Regulations of the Court and effectively circumvents the Appeals Chamber's Decision of 21 March 2014, which rejected Mr Mangenda's request for an extension of the page limit.

[30] Response to the Document in Support of the Appeal, para. 1, fn. 6.
[31] The English version is 22 pages long.

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21. Regulation 29 (1) of the Regulations of the Court stipulates that "[i]n the event of non-compliance of a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice". In the circumstances of this case, while the Appeals Chamber notes with great concern Mr Mangenda's failure to comply with regulation 36 of the Regulations of the Court, the Appeals Chamber considers that it is in the interests of justice to accept the Document in Support of the Appeal nevertheless.[32] Ordering its re-filing would have unduly delayed the proceedings, which the Appeals Chamber does not consider appropriate, given the subject matter of interim release. Having found this, Mr Mangenda is reminded of the importance of complying with the requirements for the format of documents filed with the Court, as stipulated in the Regulations of the Court. Breaches of these requirements may result in, *inter alia*, rejection of documents filed in the future.[33]

V. MERITS

22. Mr Mangenda presents three grounds of appeal. Under his first ground of appeal, he argues that the Pre-Trial Chamber erred in dismissing his arguments directed at demonstrating that the Arrest Warrant Decision was erroneous and that he therefore should be released.[34] Under his second ground of appeal, Mr Mangenda argues that the Pre-Trial Chamber erred when it found that reasonable grounds to believe existed that he was criminally responsible for offences under article 70 of the Statute.[35] As for his third ground of appeal, he argues that the Pre-Trial Chamber erred when it found that his detention appeared necessary for the grounds set out in article 58 (1) (b) of the Statute;[36] that the Pre-Trial Chamber erred regarding

[32] *See, e.g., Prosecutor v. Thomas Lubanga Dyilo,* "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", 14 December 2012, ICC-01/04-01/06-2953 (A A2 A3 OA 21), para 21.
[33] *See Prosecutor v. Bosco Ntaganda,* "Judgment on the appeal of Mr Bosco Ntaganda against the decision of the Pre-Trial-Chamber II of 18 November 2013 entitled 'Decision on the Defence's Application for Interim Release'", 5 March 2014, ICC-01/04-02/06-271-Red (OA) (hereinafter: "*Ntaganda OA Judgment*"), para. 16; *Prosecutor v. Jean-Pierre Bemba Gombo,* "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", 16 December 2013, ICC-02/11-01/11-572 (OA 5), para. 13.
[34] Document in Support of the Appeal, paras 2-15.
[35] Document in Support of the Appeal, paras 16-21.
[36] Document in Support of the Appeal, paras 22-30.

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conditions for release,[37] and by not calling a hearing on the Application for Interim Release.[38]

23. Before turning to Mr Mangenda's grounds of appeal, the Appeals Chamber notes that he is charged with offences against the administration of justice, which fall under a special regime set out in article 70 of the Statute and rules 162 to 169 of the Rules of Procedure and Evidence. Notwithstanding these specific provisions, rule 163 (1) of the Rules of Procedure and Evidence stipulates that "[u]nless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70".[39] Accordingly, the Appeals Chamber finds that articles 58 and 60 of the Statute are applicable to offences charged under article 70 of the Statute, and thus to the present appeal.

A. Standard of review

24. In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it "will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision".[40]

25. The Appeals Chamber has explained its approach to factual errors in respect of decisions on interim release as follows:

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[37] Document in Support of the Appeal, para. 30.
[38] Document in Support of the Appeal, para. 31.
[39] Rule 163 (2) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 2 [regarding the Court's jurisdiction, admissibility and applicable law], and any rules thereunder, shall not apply, with the exception of article 21". Rule 163 (3) of the Rules of Procedure and Evidence provides that "[t]he provisions of Part 10 [regarding enforcement], and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111". Rule 165 (2) of the Rules of Procedure and Evidence pertaining to investigation, prosecution and trial stipulates that "[a]rticles 53 and 59, and any rules thereunder, shall not apply". With respect to the sanctions applicable, rule 166 (2) of the Rules of Procedure and Evidence provides that with the exception of article 77 (2) (b), the provisions of article 77 and related rules shall not apply.
[40] *Ntaganda OA Judgment*, para. 29; *Prosecutor v. Callixte Mbarushimana,* "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"'", 14 July 2011, ICC-01/04-01/10-283 (OA) (hereinafter: "*Mbarushimana OA Judgment*"), para. 15, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red (OA 2) (hereinafter: "*Bemba OA 2 Judgment*"), para. 62.

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> The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will "defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention". Therefore, the Appeals Chamber "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[41] [Footnotes omitted.]

26. In relation to alleged errors of law, the Appeals Chamber has previously held that it will not defer to the Trial (or Pre-Trial) Chamber's legal interpretation, but "will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law".[42]

27. In the *Mbarushimana OA Judgment*, the Appeals Chamber noted that the appellant's mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts or the weight it accorded to particular factors is not enough to establish a clear error.[43]

28. It is also recalled that "an appellant is obliged not only to set out an alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[44] Failure to do so may lead to the Appeals Chamber dismissing arguments *in limine,* without full consideration of their merits.

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[41] *Ntaganda OA Judgment*, para. 31, citing *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo"'", 5 March 2012, ICC-01/05-01/08-2151- Red (OA 10), para. 16. *See also Prosecutor v. Laurent Koudou Gbagbo*, "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"'", 26 October 2012, ICC-02/11-01/11-278-Red (OA) (hereinafter: "*Gbagbo OA Judgment*"), para. 51.

[42] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'", 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20 (in relation to errors of law generally).

[43] *Mbarushimana OA Judgment*, paras 21, 31.

[44] *Ntaganda OA Judgment*, para. 32; Prosecutor *v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges', 19 October 2010, ICC-01/05-01/08-962 (OA 3), para. 102, citing *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal

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B. First ground of appeal

29. As his first ground of appeal, Mr Mangenda submits that the Pre-Trial Chamber erred in the way in which it addressed his arguments relating to the purported unlawfulness of the Arrest Warrant Decision.[45] Mr Mangenda requests that, on this basis, the Appeals Chamber order his immediate release.[46]

1. Relevant part of the Impugned Decision

30. Mr Mangenda's principal argument in the Application for Interim Release was that the Arrest Warrant Decision was unlawful for two reasons: first, it did not state in sufficient detail the factual allegations on which it was based;[47] second, it was based to a large extent on evidence collected by an independent counsel who had been appointed by the Pre-Trial Chamber (hereinafter: "Independent Counsel"), even though such appointment was illegal under the Statute.[48] Mr Mangenda argued that, given that the Arrest Warrant Decision was unlawful, there was no other remedy but his release.[49]

31. In the Impugned Decision, the Pre-Trial Chamber addressed these arguments and found that "the validity of the arrest warrant is 'not a dispositive issue regarding provisional release'" and that it was not listed as one of the factors to be considered in taking a decision pursuant to article 60 (2) of the Statute.[50] The Pre-Trial Chamber held that, in contesting the validity of the Arrest Warrant Decision, Mr Mangenda is actually seeking to appeal that decision, "a remedy for which there is no provision in the statutory texts of the Court and which, even if it existed, could not obviously be brought before and decided by the same Chamber as the one having issued the warrant".[51] Citing a previous decision of Pre-Trial Chamber II in the *Situation in the Republic of Kenya*,[52] the Pre-Trial Chamber noted:

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of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 48.
[45] Document in Support of the Appeal, paras 2-14.
[46] Document in Support of the Appeal, para. 15.
[47] Application for Interim Release, paras 2-5.
[48] Application for Interim Release, paras 6-9.
[49] Application for Interim Release, para. 10.
[50] Impugned Decision, para. 2.
[51] Impugned Decision, para. 2.
[52] "Decision on the 'Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)'", 11 February 2011, ICC-01/09-42 (hereinafter: "*Kenya Article 58 Decision*").

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> the legal texts of the Court do not provide the person named in the Prosecutor's application under article 58 with any procedural instrument before the Pre-trial Chamber allowing him to challenge the evidence presented by the Prosecutor other than ... through the procedural remedies expressly provided for and within the context and for the purposes of ... the confirmation of the charges pursuant to article 61(1) of the Statute.[53]

32. The Pre-Trial Chamber also noted that where arrest or detention are shown to be unlawful, the Statute provides for the right to compensation pursuant to article 85 of the Statute and rules 173 and 174 of the Rules of Procedure and Evidence.[54]

33. Nevertheless, the Pre-Trial Chamber noted, "for the sole sake of clarity", that contrary to the argument of Mr Mangenda in his Application for Interim Release that the factual basis of the Arrest Warrant Decision is not clearly articulated,[55] both the Application for Warrants of Arrest[56] and the Arrest Warrant Decision "do contain extensive and specific references to the facts, and their circumstances of time and space, which underpin the counts formulated by the Prosecutor".[57]

34. The Pre-Trial Chamber also held that, contrary to the argument advanced by Mr Mangenda in his Application for Interim Release, its criticism in the Arrest Warrant Decision of the Prosecutor's approach 'to articulate the *counts* in generic terms' does not contradict its ultimate finding that reasonable grounds existed to believe that Mr Mangenda had committed the offences alleged.[58] The Pre-Trial Chamber noted that, indeed, in the Arrest Warrant Decision, it found that "'numerous, objective and detailed items of evidence were tendered in relation to each category of alleged conduct' and each person whose arrest was sought", and which related directly to the specific factual allegations.[59]

35. Finally, the Pre-Trial Chamber noted that the legitimacy of the mandate of the Independent Counsel and concomitant admissibility of evidence stemming therefrom would be issues to be addressed in the context of deciding whether or not the charges

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[53] Impugned Decision, para. 2, referring to *Kenya Article 58 Decision*, para. 19.
[54] Impugned Decision, para. 2.
[55] Application for Interim Release, para. 3.
[56] 27 November 2013, ICC-01/05-01/13-19-Conf.
[57] Impugned Decision, para. 3.
[58] Impugned Decision, para. 4 (emphasis in original).
[59] Impugned Decision, para. 4.

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ought to be confirmed, which "parties will eventually have the opportunity to submit [...] to the scrutiny of the Appeals Chamber".[60]

2. *Mr Mangenda's submissions before the Appeals Chamber*

36. As his first ground of appeal, Mr Mangenda argues that the Arrest Warrant Decision was not lawfully issued, and that his ensuing detention is therefore also unlawful.[61] He submits that, contrary to the assertion of the Pre-Trial Chamber that the Arrest Warrant Decision contains 'extensive' and specific references to the facts, and their circumstances of time and space', it actually fails to set out the "particulars" upon which it relies, and is therefore insufficiently reasoned.[62] Mr Mangenda avers that the "statement of facts is a formal and substantive condition for a warrant of arrest which [...] affects a suspect's fundamental rights" and its absence cannot be cured by evidence which, in any event, "has thus far failed to prove anything" in his case.[63] Mr Mangenda argues that, as a result, after four months in detention, he is only aware of the charges against him, rather than their factual basis, and thus is "not in a position to ascertain the circumstances of his detention" or able to "mount his defence".[64]

37. Mr Mangenda submits further that the Pre-Trial Chamber erred in law by finding that the Arrest Warrant Decision could not be contested at this stage of proceedings because such a challenge was not provided for in article 60 (2) of the Statute, nor elsewhere in the Court's statutory framework.[65] He argues that it "would indeed be absurd to suggest that the Court may issue unlawful warrants of arrest without the possibility of judicial review".[66] Accordingly, Mr Mangenda argues that, in fact, his application should not have been characterised as one of "interim release", but rather "purely and simply as an application for **immediate** release on the ground of unlawful arrest", and that article 60 (2) of the Statute is therefore not applicable at all.[67] Mr Mangenda avers that he has a fundamental right to submit questions pertaining to his right to freedom "**immediately**" to a court, separately from the

[60] Impugned Decision, para. 5.
[61] *See* Document in Support of the Appeal, paras 2-15.
[62] Document in Support of the Appeal, para. 3, citing Impugned Decision, para. 3.
[63] Document in Support of the Appeal, para. 3.
[64] Document in Support of the Appeal, para. 3.
[65] Document in Support of the Appeal, para. 4.
[66] Document in Support of the Appeal, para. 15.
[67] Document in Support of the Appeal, para. 5 (emphasis in original).

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process of the confirmation of charges, and that the Pre-Trial Chamber erred in law by erroneously conflating these two issues.[68]

38. Mr Mangenda argues further that the Pre-Trial Chamber erred in stating that the sole remedy for unlawful detention and arrest is the right to compensation, as opposed to the right to be released, which he avers ought to be the primary remedy.[69]

39. Mr Mangenda argues that the Arrest Warrant Decision is also "null and void" because it relied on the investigations of the Independent Counsel engaged by the Pre-Trial Chamber to perform investigative work in parallel with the Prosecutor.[70] He submits that there was no statutory basis for the appointment of Independent Counsel, given the powers of investigation are vested solely in the Prosecutor, "who shall investigate incriminating and exonerating circumstances equally" and who cannot delegate these powers.[71] He further avers that there was "**no established procedure**" for the Independent Counsel to follow in carrying out his "illegal 'mission'".[72] Mr Mangenda argues also that the fact that the Independent Counsel did not use an independent sworn translator, and merely "listen[ed] to, select[ed] excerpts, translate[d] freely and ma[de] observations which are deductive rather than inductive, and subjective rather than objective" means that his reports were not reliable or lawful.[73]

40. Mr Mangenda argues that, in relying on the investigations of Independent Counsel, the Pre-Trial Chamber "breached article 69(7) of the Statute by relying on purported evidence which was unlawfully obtained, and which seriously impairs the fairness of the proceedings".[74] He argues that the appointment of the Independent Counsel to deal exclusively with matters of professional conduct, especially in relation to confidentiality, is reflective of a fundamental flaw in the regime of the Court, being the lack of an independent bar association that entrenches lawyers' independence.[75] He argues that, according to the "United Nations Principles on the Role of Lawyers" and the "Charter of Core Principles of the European Legal

[68] Document in Support of the Appeal, para. 5 (emphasis in original).
[69] Document in Support of the Appeal, para. 6.
[70] Document in Support of the Appeal, para. 7.
[71] Document in Support of the Appeal, para. 7.
[72] Document in Support of the Appeal, para. 7 (emphasis in original).
[73] Document in Support of the Appeal, para. 7.
[74] Document in Support of the Appeal, para. 7.
[75] Document in Support of the Appeal, para. 8.

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Profession" (together, hereinafter: "Principles"), it is "mandatory to establish an independent professional association of lawyers for courts and tribunals".[76]

41. Mr Mangenda avers that the regime established by the mandate of Independent Counsel was therefore unlawful as it contravenes these Principles, which he argues apply to him and which "guarantee lawyers' independence vis-à-vis the State", including requiring that lawyer-client privilege be lifted "only subject to very strict independent safeguards".[77] Mr Mangenda argues that the mandate of the Independent Counsel was flawed insofar as his duties ought to have been exclusively within the purview of an independent professional association of lawyers, and that being Court-appointed, it "cannot possibly be considered as 'independent'".[78] He argues that the Dean of the professional lawyer's association in The Hague, who has been involved in relation to certain documents seized by the Dutch authorities, ought to have been tasked with such duties instead.[79]

42. Mr Mangenda avers further that, in not ensuring that the Independent Counsel's mandate included "oversight over confidentiality", the Pre-Trial Chamber failed to "put in place the necessary safeguards in respect of [Mr Mangenda]'s lawyer-client privilege both as a member of Mr [Jean-Pierre Bemba Gombo (hereinafter: "Mr Bemba")]'s Defence and as a member of the Kinchasa-Matete Bar Association", and accordingly, committed an error of law.[80] Mr Mangenda argues that the Arrest Warrant Decision and his ensuing detention are therefore unlawful under article 69 (7) of the Statute to the extent that they are based on the reports of the Independent Counsel.[81]

43. Mr Mangenda argues further that the question of the legitimacy of the mandate of the Independent Counsel is critical to reaching the conclusion as to whether or not reasonable grounds exist to issue a warrant of arrest, and that the Pre-Trial Chamber therefore erred in law in finding that such questions were relevant only to the

[76] Document in Support of the Appeal, para. 8 (emphasis in original omitted).
[77] Document in Support of the Appeal, para. 8 (emphasis in original omitted).
[78] Document in Support of the Appeal, para. 9.
[79] Document in Support of the Appeal, para. 9.
[80] Document in Support of the Appeal, para. 10 (emphasis in original omitted).
[81] Document in Support of the Appeal, para. 10.

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confirmation of charges hearing.[82] He argues further that this breaches article 60 of the Statute.[83]

44. Mr Mangenda also notes that the Pre-Trial Chamber did not address in the Impugned Decision the argument outlined in his Application for Interim Release that its 'satisfaction [...] may be largely based on the monitoring of telephone conversations between lawyers and the client and lawyers', which Mr Mangenda argues is "antithetical to the very notion of confidentiality".[84] He argues that the telephone monitoring relied upon was unlawful because, *inter alia*, (i) the conversations were "systematically recorded by the Registry without authorisation"; and (ii) the Prosecutor failed to request a waiver of Mr Mangenda's immunity before requesting authorisation to monitor his telephone conversations.[85] Mr Mangenda avers that the Pre-Trial Chamber erred in law in failing to take into account that the Arrest Warrant Decision was based on unlawful telephone monitoring and the unlawful review of the records of this telephone monitoring by the Independent Counsel, which violated article 69 (7) of the Statute and rendered the Arrest Warrant Decision "null and void".[86] He submits that this rendered his detention unlawful and "thus infringes his right to liberty".[87]

3. *The Prosecutor's submissions before the Appeals Chamber*

45. The Prosecutor submits that the arguments of Mr Mangenda in relation to the validity of the arrest warrant "fail on the law and should be summarily dismissed".[88] She avers that the Pre-Trial Chamber "expressly found that [its] decision on whether to grant interim release pending trial pursuant [a]rticle 60 (2) did not extend to matters concerning the validity of the arrest warrant", and that "[a]n appeal against a decision on interim release is not the place to challenge, through the backdoor, the legality of the arrest warrant".[89] The Prosecutor further argues that Mr Mangenda failed to establish a clear error of law, fact or procedure in relation to the determination by the Pre-Trial Chamber under article 60 (2) of the Statute, as is required for appeals under

[82] Document in Support of the Appeal, para. 11.
[83] Document in Support of the Appeal, para. 7
[84] Document in Support of the Appeal, para. 12, referring to Application for Interim Release, para. 9.
[85] Document in Support of the Appeal, paras 13-14 (emphasis in original omitted).
[86] Document in Support of the Appeal, para. 14.
[87] Document in Support of the Appeal, para. 15.
[88] Response to the Document in Support of the Appeal, para. 2.
[89] Response to the Document in Support of the Appeal, para. 3.

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article 82 (1) (b) of the Statute, and that therefore "his challenge on this point must fail".[90]

46. The Prosecutor argues that, in any event, the arguments underlying Mr Mangenda's submissions on the illegality of the arrest warrant "lack merit", and that, contrary to his submissions, article 85 of the Statute and rules 173 and 174 of the Rules of Procedure and Evidence "clearly and exhaustively regulate" the remedies for illegal arrest and detention.[91] She avers that Mr Mangenda's arguments in relation to the appointment of the Independent Counsel merely attempt to re-litigate issues that he has already raised in his Application for Release, and for which the Pre-Trial Chamber had also already denied leave to appeal.[92] The Prosecutor argues that, in a similar vein, Mr Mangenda's arguments regarding the illegally obtained telephone conversations are "an attempt to appeal against a separate decision, which allowed the collection of such evidence", and also fail to link the purportedly illegal collection of evidence with that of continued detention.[93]

4. Determination by the Appeals Chamber

47. The Appeals Chamber notes that Mr Mangenda's primary argument focuses on the remedy of immediate release, which he argues the Pre-Trial Chamber ought to have granted on the basis that his arrest was unlawful.[94] The Appeals Chamber notes that there exists an internationally recognised human right to have the lawfulness of one's arrest and/or detention judicially reviewed, which entails the concomitant remedy of release.[95] Indeed, the Appeals Chamber has previously found that this human right is "entrenched in article 60 of the Statute".[96] Accordingly, in circumstances where a suspect has already been surrendered to the Court, the Appeals

[90] Response to the Document in Support of the Appeal, para. 3.
[91] Response to the Document in Support of the Appeal, para. 4.
[92] Response to the Document in Support of the Appeal, para. 5.
[93] Response to the Document in Support of the Appeal, para. 6.
[94] Document in Support of the Appeal, para. 5.
[95] *See* article 21 (3) of the Statute. *See also* article 9 (4) of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171; article 5 (4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 United Nations Treaty Series 221 *et seq.*, registration no. 2889; article 7 (6) of the *American Convention on Human Rights*, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955.
[96] *See Prosecutor v Thomas Lubanga Dyilo*, "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007", 13 June 2007, ICC-01/04-01/06-926 (OA 8), para. 13, in particular fn. 25, which refers to provisions cited in the previous footnote in the present judgment.

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Chamber does not consider that the remedy of release is available except as provided for in article 60 of the Statute. This means that the principal consideration is not whether a warrant of arrest has been illegally issued, but whether the conditions for detention under article 58 (1) of the Statute are presently met (article 60 (2) of the Statute), whether there has been a change in the circumstances (article 60 (3) of the Statute), or whether the person has been detained for an unreasonably long period prior to trial, due to an inexcusable delay by the Prosecutor (article 60 (4) of the Statute). The Appeals Chamber further notes that, in addition to article 60 of the Statute, article 85 of the Statute provides for the remedy of compensation in the case that an arrest is found to have been unlawful.[97]

48. It is recalled that Mr Mangenda requested to be *released* based on the purported unlawfulness of the Arrest Warrant Decision; he did not request a finding of unlawfulness as a basis for seeking compensation under article 85 of the Statute. The Appeals Chamber can therefore discern no clear error in the Pre-Trial Chamber's decision to dismiss Mr Mangenda's arguments on this point.[98]

C. Second ground of appeal

49. Under his second ground of appeal, Mr Mangenda argues that the Pre-Trial Chamber erred when it found that reasonable grounds to believe existed that he was criminally responsible for offences under article 70 of the Statute.[99] To support this claim, he avers, *inter alia*, that the Pre-Trial Chamber erred in fact in finding that the conditions underpinning article 58 (1) (a) of the Statute continue to be met.[100]

1. Relevant part of the Impugned Decision

50. In the Impugned Decision, the Pre-Trial Chamber stated that it agreed with Mr Mangenda's submissions that, until such time as a verdict of guilt has been handed down, a person's fundamental rights must be respected, "among which the right to

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[97] *See* rule 173 (2) (a) of the Rules of Procedure and Evidence, which provides that "[t]he request for compensation shall be submitted not later than six months from the date the person making the request was notified of the decision of the Court concerning: (a) The unlawfulness of the arrest or detention under article 85, paragraph 1".

[98] *See* Impugned Decision, para. 2 - the Appeals Chamber notes that, in considering Mr Mangenda's argument, the Pre-Trial Chamber found that there is nothing in the legal texts of the Court providing for release on the basis of the unlawfulness of the Arrest Warrant Decision, but rather "where arrest and or detention are shown to be unlawful, the Statute provides for the right to compensation".

[99] Document in Support of the Appeal, paras 16-21.

[100] Document in Support of the Appeal, para. 16.

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liberty features prominently".[101] The Pre-Trial Chamber noted, however, that while detention is an exceptional measure, it shall "unfailingly apply, when the relevant statutory requirements are satisfied".[102] It noted the Appeals Chamber's ruling that decisions taken under article 60 (2) of the Statute are not discretionary, but rather, "[d]epending upon whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall [...] continue[...] to be detained or shall be released".[103]

51. The Pre-Trial Chamber recalled that in the Arrest Warrant Decision, the Pre-Trial Chamber had found that, based on the material underpinning the Application for Warrants of Arrest, there existed reasonable grounds to believe that:

> [Mr] Mangenda assisted [Mr] Bemba and Aimé Kilolo [hereinafter: "Mr Kilolo"] in the furtherance of a criminal scheme aimed at obstructing the course of justice in the case [of t]he *Prosecutor v. Jean-Pierre Bemba Gombo* [hereinafter: "*Bemba* Case"] and, more specifically, that he i) frequently appeared to 'receive money transfers via Western Union, particularly when Defence witnesses appear in court'; ii) worked 'very closely with [Mr] Kilolo in respect of the coaching of witnesses and the devising of instructions to be issued to them'; iii) took part 'in certain privileged conference calls with [Mr] Bemba and Fidèle Babala [hereinafter: "Mr Babala")' (footnote omitted).[104]

52. The Pre-Trial Chamber then summarised the evidence it had relied upon to conclude that reasonable grounds existed, notably the annexes to the Application for Warrants of Arrest,[105] and the two reports submitted by the Independent Counsel (hereinafter: "Independent Counsel Reports") on 25 October 2013[106] (hereinafter: "Report of 25 October 2013") and on 14 November 2013[107] (hereinafter: "Report of 14 November 2013").[108]

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[101] Impugned Decision, para. 8, *referring to* Application for Interim Release, para. 11.
[102] Impugned Decision, para. 8.
[103] Impugned Decision, para. 8, referring to *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitle 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: "*Lubanga OA 7 Judgment*"), para. 134.
[104] Impugned Decision, para. 11.
[105] Impugned Decision, para. 12.
[106] "Premier rapport du Conseil Indépendant (période du 15 au 30 août 2013)", ICC-01/05-64-Conf-Exp. A confidential redacted version of the report was filed on 16 December 2013 as ICC-01/05-64-Conf-Red.
[107] "Deuxième rapport du Conseil Indépendant (période du 23 août au 16 octobre 2013)", registered on 15 November 2013, ICC-01/05-66-Conf-Exp. A confidential redacted version of the report was filed on 16 December 2013 as ICC-01/05-66-Conf-Red.
[108] Impugned Decision, para. 13.

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53. The Pre-Trial Chamber noted that none of this material contained in the Application for Warrants of Arrest or in the Independent Counsel Reports was addressed by Mr Mangenda.[109] It stated in this connection that, given that the material attached to the Application for Warrants of Arrest was reclassified as confidential on 27 November 2013 and thus made available to Mr Mangenda, and that he filed his Application for Interim Release on 8 January 2014, he "had had more than a full month to analyse such material" and was therefore in a position to ascertain the factual basis for his detention.[110]

54. The Pre-Trial Chamber recalled a number of arguments put forward by Mr Mangenda in his Application for Interim Release regarding alleged errors in the Arrest Warrant Decision, including: (i) that, regarding the Western union money transfers for which he was a beneficiary, the Application for Warrants of Arrest fails to specify the locations or dates of the offences alleged;[111] (ii) that the sums of money Mr Mangenda received as case manager were transferred to 'cover the needs of Mr Bemba in prison';[112] (iii) that as case manager to Mr Bemba, Mr Mangenda had only a 'role of executor' and did not participate in interviews with witnesses, and was thus not in a position to influence them.[113] The Pre-Trial Chamber noted in relation to these arguments that "no generic statement as to the purportedly neutral, or passive, role of [Mr] Mangenda's as a case manager is suitable to contradict the numerous elements showing not only his full awareness of the scheme being implemented, but also his instrumental role in its implementation, and even his appreciation of its efficient outcome".[114]

55. The Pre-Trial Chamber further noted Mr Mangenda's argument that the count for which he was charged under article 70 (1) (b) of the Statute, which relates to presenting evidence that the party knows is false or forged, "unduly pre-empts Trial Chamber III's decision as to the authenticity of a number of documents submitted in the context of the [*Bemba*] Case", given that, according to Mr Mangenda, "no charge consisting of falsification of documents presented before a Chamber can be

[109] Impugned Decision, para. 15.
[110] Impugned Decision, para. 15.
[111] Impugned Decision, para. 16, referring to Application for Interim Release, para. 14.
[112] Impugned Decision, para. 16, referring to Application for Interim Release, para. 15.
[113] Impugned Decision, para. 18.
[114] Impugned Decision, para. 19.

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formulated in the absence of, or before, a decision of that Chamber determining that such documents were indeed falsified".[115] In the view of the Pre-Trial Chamber, this argument was "based on an undue overlapping of the standards of proof respectively applying at the stage of issuance of a warrant of arrest under article 58 and at the time of the judgment", and, having satisfied itself of the former threshold of "reasonable grounds to believe" he committed the offence in question, dismissed Mr Mangenda's argument.[116]

56. The Pre-Trial Chamber held that, "[u]nder these circumstances", it was still persuaded that, based on an "*ex novo*" assessment of the information and materials contained in the Application for Warrants of Arrest and the Independent Counsel Reports, reasonable grounds to believe continued to exist that Mr Mangenda committed the crimes alleged by the Prosecutor "and that, therefore, the requirement of article 58(1)(a) of the Statute continue to be satisfied".[117]

2. Mr Mangenda's submissions before the Appeals Chamber

57. Mr Mangenda argues that the Arrest Warrant Decision contains errors of fact, in addition to the "formal and substantive errors" alleged in relation to his first ground of appeal.[118] In that regard, he advances three main arguments, regarding: (i) his alleged frequent receipt of money transfers via Western Union in relation to Defence witnesses appearing in court; (ii) his close work with Mr Kilolo in witness coaching; and (iii) his involvement in privileged conference calls with Mr Bemba and Mr Babala.

58. Mr Mangenda argues in relation to the allegation that "[h]e frequently appears to receive money transfers via Western Union, particularly when Defence witnesses appear in court"[119] that the Pre-Trial Chamber violated the principle of 'equality of arms' by initially refusing to allow this record of the monies deposited by Mr Mangenda[120] to be disclosed to him.[121] He also argues, in this connection, that the

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[115] Impugned Decision, para. 20.
[116] Impugned Decision, para. 21.
[117] Impugned Decision, para. 22.
[118] Document in Support of the Appeal, para. 17.
[119] Document in Support of the Appeal, p. 13 (emphasis in original omitted).
[120] *See* Document in Support of the Appeal, para. 18, referring to Annex A, ICC-01/05-01/13-198-Conf-AnxA to "Defence provision of information pursuant to decision ICC-01/05-01/13-185", dated 16 February 2014 and registered on 17 February 2014, ICC-01/05-01/13-198.
[121] Document in Support of the Appeal, para. 18.

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"Prosecution had recognised failure to meet its obligation to investigate incriminating and exonerating circumstances equally".[122] Mr Mangenda avers that the Pre-Trial Chamber erred in fact and law "in refusing to rely on this record, even though it was prepared by the Court", insofar as it demonstrates that the monies received via Western Union "were not used to corruptly influence witnesses to give false testimony".[123] Mr Mangenda argues that, instead, the Pre-Trial Chamber continues erroneously to maintain that Mr Mangenda was the source of monies transferred to witnesses without giving "details [...] or indeed any proof", and that there is ultimately no evidence of the "alleged procurement of witnesses to give false testimony".[124]

59. In relation to the allegation that "[h]e works very closely with [Mr] Kilolo in respect of coaching witnesses and devising instructions to be issued to them",[125] Mr Mangenda argues that the Pre-Trial Chamber erred in fact by failing to respond to his contention that he could not possibly have influenced witnesses, "given that he had no contact with them, and in failing to counter the contention by way of specific evidence".[126] He submits further that the Pre-Trial Chamber was "partial" and committed errors of fact by merely referring to the Independent Counsel Reports, and finding them 'probative', "without indicating which specific passages [it] was referring to in relation to [Mr Mangenda]".[127] Mr Mangenda maintains that none of the excerpts point to his role in witness-coaching.[128] He argues further that the "repetitive, standardised comments of the [Independent C]ounsel" indicate, *inter alia*, the latter's "lack of independence and [its] bias".[129]

60. Mr Mangenda contends in relation to the count for which he was charged under article 70 (1) (b) of the Statute, which relates to presenting evidence that the party knows is false or forged, that the Pre-Trial Chamber committed an error of fact on the basis that the charge has not yet been established, given that the alleged falsification

[122] Document in Support of the Appeal, para. 18 (emphasis in original omitted).
[123] Document in Support of the Appeal, para. 18.
[124] Document in Support of the Appeal, para. 18 (emphasis in original omitted).
[125] Document in Support of the Appeal, p. 14 (emphasis in original omitted).
[126] Document in Support of the Appeal, para. 19.
[127] Document in Support of the Appeal, para. 19.
[128] Document in Support of the Appeal, para. 19.
[129] Document in Support of the Appeal, para. 19.

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of the evidence has yet to be adjudicated in the *Bemba* Case.[130] Mr Mangenda argues that the Pre-Trial Chamber omitted to verify whether the matter has subsequently been ruled upon by the Pre-Trial Chamber in the *Bemba* Case, which it ought to have done, and "prays the Appeals Chamber do undertake the verification".[131]

61. In relation to the allegation that Mr Mangenda "takes part in certain privileged conference calls with [Mr] Bemba and [Mr] Babala",[132] Mr Mangenda argues that "[p]articipation by [Mr Mangenda] in telephone conversations is not in and of itself 'suspicious'".[133] Mr Mangenda avers that the Pre-Trial Chamber failed to give specific details about his accusations, and that he did not, in fact, "participate in **any** of the conversations in question".[134] He argues that the Pre-Trial Chamber referred in the Arrest Warrant Decision to such conversations as "incriminating" on the basis that they were privileged, whereas the fact they were privileged reflects a mandatory legal requirement which applies to the defence team in its entirety.[135]

62. Mr Mangenda concludes that the Arrest Warrant Decision "does not specify or establish the 'reasonable grounds' and hence [he] cannot mount his defence based on concrete facts".[136]

3. The Prosecutor's submissions before the Appeals Chamber

63. The Prosecutor argues that Mr Mangenda's submissions in relation to article 58 (1) (a) of the Statute "constitute mere disagreement with the [Pre-Trial Chamber]'s findings and should be dismissed".[137] She avers that, based on the relevant standard of review, the Appeals Chamber ought to defer to the Pre-Trial Chamber's findings on the 'available evidence and to the weight it accorded to the different factors militating for or against detention', and 'will interfere only in the case of a clear error'.[138] The Prosecutor argues that the Pre-Trial Chamber clearly set out its reasoning in the

[130] Document in Support of the Appeal, para. 20.
[131] Document in Support of the Appeal, para. 20.
[132] Document in Support of the Appeal, p. 15 (emphasis in original omitted).
[133] Document in Support of the Appeal, para. 21.
[134] Document in Support of the Appeal, para. 21 (emphasis in original).
[135] Document in Support of the Appeal, para. 21.
[136] Document in Support of the Appeal, para. 21(emphasis in original omitted).
[137] Response to Document in Support of the Appeal, para. 7.
[138] Response to Document in Support of the Appeal, para. 7.

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Impugned Decision, including specific reference to "some" of the materials underpinning the Arrest Warrant Decision, as assessed '*ex novo*'.[139]

64. The Prosecutor argues, specifically in relation to "the materials received from the Registry in relation to the deposits [Mr Mangenda] made into [Mr] Bemba's Detention Centre account",[140] that the Pre-Trial Chamber indeed considered these and found them irrelevant to its determination under article 60 (2) of the Statute.[141] She avers further that the Pre-Trial Chamber also considered Mr Mangenda's argument regarding, *inter alia*, his lack of influence over Defence witnesses, and found it unpersuasive.[142] She states that Mr Mangenda's further arguments regarding, *inter alia*, the lack of probative value of the Independent Counsel Reports, "amount to no more than [a] disagreement with the findings" of the Pre-Trial Chamber.[143]

65. The Prosecutor further argues that Mr Mangenda's argument that the Pre-Trial Chamber erred in not mentioning any of the "facts" in relation to the count for which he was charged under article 70 (1) (b) of the Statute, which relates to presenting evidence that the party knows is false or forged, is "inaccurate".[144] She avers that the Pre-Trial Chamber devoted two full paragraphs to a review of the evidence supporting the findings in relation to this count.[145] The Prosecutor adds further that the Pre-Trial Chamber was not obliged to clarify the status of the allegedly forged documents in question, as it should not predicate its findings in relation to Mr Mangenda's detention on the determination by another Chamber of the documents' authenticity.[146]

66. Finally, the Prosecutor argues that the Pre-Trial Chamber did not err by "considering the participation of [Mr Mangenda] in certain conversations with [Mr] Bemba and [Mr] Babala".[147] She avers that Mr Mangenda fails to demonstrate the way in which this amounts to an appealable error materially affecting the Impugned Decision, and that this finding in fact "comprise[d] an extensive part of the

[139] Response to Document in Support of the Appeal, para. 8.
[140] Response to Document in Support of the Appeal, para. 9.
[141] Response to Document in Support of the Appeal, para. 9.
[142] Response to Document in Support of the Appeal, para. 10.
[143] Response to Document in Support of the Appeal, para. 10.
[144] Response to Document in Support of the Appeal, para. 11.
[145] Response to Document in Support of the Appeal, para. 11.
[146] Response to Document in Support of the Appeal, para. 11.
[147] Response to Document in Support of the Appeal, para. 12.

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[Pre Trial Chamber]'s conclusion that the conditions under [a]rticle 58(1)(a) [of the Statute] continued to be met".[148]

4. Determination by the Appeals Chamber

67. The Appeals Chamber notes that Mr Mangenda's arguments, on their face, actually challenge the Arrest Warrant Decision rather than the Impugned Decision.[149] This notwithstanding, given that the Impugned Decision is, in this case, based on the same evidence as that in the Arrest Warrant Decision, the Appeals Chamber will consider Mr Mangenda's arguments to the extent they relate to the findings in the Impugned Decision. Arguments put forward in relation to both Mr Mangenda's first and second grounds of appeal will therefore now be addressed.

68. The Appeals Chamber will first turn to Mr Mangenda's argument that the Pre-Trial Chamber erred in relying on the investigations of the Independent Counsel, whom it engaged to perform investigative work in parallel with the Prosecutor.[150] The Appeals Chamber notes that Mr Mangenda argues that there was no statutory basis for the appointment of Independent Counsel[151] and "no established procedure" for the Independent Counsel to follow in carrying out his "illegal 'mission'",[152] which he avers ought properly to have been carried out by an independent bar association.[153] Mr Mangenda argues that, accordingly, the Pre-Trial Chamber breached article 69 (7) of the Statute "by relying on purported evidence which was unlawfully obtained, and which seriously impairs the fairness of the proceedings", and further erred in law in relegating arguments around the overall legitimacy of the mandate of Independent Counsel, and concomitant admissibility of evidence, to the confirmation of charges.[154]

69. The Appeals Chamber notes that Mr Mangenda also argues that the evidence relied upon by the Pre-Trial Chamber to find "reasonable ground to believe" that he committed the crimes in question was flawed on the basis that it was largely based on the "monitoring of telephone conversations between lawyers and the client and

[148] Response to Document in Support of the Appeal, para. 12.
[149] *See, e.g.*, Document in Support of the Appeal, para. 17, referring to alleged errors contained in the "warrant of arrest" and "warrant".
[150] Document in Support of the Appeal, para. 7.
[151] Document in Support of the Appeal, para. 7.
[152] Document in Support of the Appeal, para. 7.
[153] Document in Support of the Appeal, paras 8-10.
[154] Document in Support of the Appeal, para. 7.

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lawyers", which Mr Mangenda argues is "antithetical to the very notion of confidentiality", given he is bound by lawyer-client privilege.[155]

70. The Appeals Chamber notes that Mr Mangenda has already sought to leave to appeal[156] the Pre-Trial Chamber's decision appointing the Independent Counsel.[157] The Pre-Trial Chamber rejected this application.[158] Mr Mangenda sought reconsideration of this decision denying leave to appeal,[159] adducing additional arguments, which the Pre-Trial Chamber, again, rejected.[160] In a similar fashion, the Appeals Chamber notes Mr Mangenda has unsuccessfully sought to bring arguments before the Pre-Trial Chamber in relation to, *inter alia*, the monitoring of telephone conversations by the Registry, which he argued was undertaken unlawfully, as well as the lack of independent bar association and issues around subsequent admissibility.[161]

71. The Appeals Chamber considers that Mr Mangenda's arguments before the Pre-Trial Chamber in relation to, *inter alia*, the mandate of the Independent Counsel, the lawfulness of telephone monitoring, and the lack of independent bar association, are almost identical to those before the Appeals Chamber in his Document in Support of the Appeal.[162] The Appeals Chamber does not consider it appropriate to consider Mr Mangenda's arguments in detail in the context of interim release, when leave to

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[155] Document in Support of the Appeal, para. 12.
[156] *See* "Requête d'autorisation d'appel de la décision publique ICC-01/05-52-Red2 03-02-2014 du 3 février 2014 sur la requête du Procureur d'obtenir des éléments de preuve sous le régime de l'article 70", 4 February 2014, ICC-01/05-01/13-149 (hereinafter: "Application of 4 February 2014"). The Appeals Chamber notes that Mr Mangenda also filed a response to his co-suspects' application seeking to appeal, *inter alia*, the Pre-Trial Chamber's decision appointing Independent Counsel. *See* "Réponse de la Défense de Monsieur Jean-Jacques KABONGO MANGENDA à la requête d'autorisation d'appel du 10 février 2014 de Monsieur Jean-Pierre BEMBA GOMBO, à la requête d'autorisation d'appel de Maître Aimé KILOLO MUSAMBA du 10 février 2014 et à la requête d'autorisation d'appel de Monsieur Fidèle BABALA WANDU de la même date.", dated 12 February 2014 and registered on 13 February 2014, ICC-01/05-01/13-184 (hereinafter: "Application of 12 February 2014").
[157] *See* "Decision on the Prosecutor's 'Request for judicial order to obtain evidence for investigation under Article 70'", 29 July 2013, ICC-01/05-52-Red2 (hereinafter: "Decision of 29 July").
[158] *See* "Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the Defence for Mr Mangenda, the Defence for Mr Kilolo and the Defence for Mr Bemba", 14 February 2014, ICC-01/05-01/13-187 (hereinafter: "Decision of 14 February 2014").
[159] "Requête d'autorisation d'appel de la décision publique ICC-01/05-01/13-187 14-02-2014 «joint decision»", 19 February 2014, ICC-01/05-01/13-203 (hereinafter: "Application of 19 February").
[160] "Decision on the 'Requête d'autorisation d'appel de la décision publique ICC-01/05-01/13-187 14-02-2014 "joint decision"' submitted by the Defence for Jean-Jacques Mangenda on 19 February 2014", 26 March 2014, ICC-01/05-01/13-295 (hereinafter: "Decision of 26 March 2014").
[161] *See* Application of 12 February 2014, para. 5; Application of 4 February 2014, paras 7-10. Mr Mangenda argues, in sum, that the evidence obtained by the Registrar and Prosecutor was therefore unlawfully obtained and that the Decision of 29 July was also unlawful.
[162] *See* Document in Support of the Appeal, paras 7-14.

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appeal in relation to these issues has previously been refused by the Pre-Trial Chamber, or when the Pre-Trial Chamber has found that Mr Mangenda lacks standing to bring such arguments before it.[163]

72. Nevertheless, the Appeals Chamber will, based on Mr Mangenda's arguments, review the Pre-Trial Chamber's findings in relation to the evidence, according to its relevant standard of review. In that regard, the Appeals Chamber recalls that it "will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[164] In the view of the Appeals Chamber, this deferential standard of review applies not only to the evaluation of the evidence itself, but also to the question of whether, in the circumstances of the case, the material may be relied upon when determining whether "reasonable grounds" in terms of article 58 (1) (a) of the Statute exists.

73. In applying this standard, the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's decision to defer substantive considerations around admissibility of evidence, included the related issue of the mandate of Independent Counsel, to the confirmation of charges.[165] The Appeals Chamber is cognisant of the requirement, at this stage of proceedings, to be satisfied of "reasonable grounds to believe" that a suspect committed the crimes alleged, in order to maintain detention. However, the Appeals Chamber does not consider that substantive considerations around admissibility of evidence can be appropriately addressed in the context of a decision taken on interim release, in the absence of obvious *male fides*. Conducting such an assessment would overload article 58 (1) (a) of the Statute with the burdensome requirement to adjudicate issues relating to article 69 (7) of the Statute at a very early stage of proceedings, in which the proper focus ought to be confined to be reviewing a suspect's detention and the conditions underpinning the same. Therefore, in the present circumstances, the Appeals Chamber does not consider that it was unreasonable for the Pre-Trial Chamber to defer admissibility issues to be adjudicated

[163] *See* Decision of 26 March 2014; Decision of 14 February 2014.
[164] *Mbarushimana OA Judgment*, paras 1, 17.
[165] *See* Document in Support of the Appeal, para. 11, referring to Impugned Decision, para. 5.

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"in the context of determinations to be made for the purposes of deciding whether the charges will have to be confirmed".[166]

74. The Appeals Chamber notes that, in order to support its conclusion that the conditions of article 58 (1) (a) were fulfilled, the Pre-Trial Chamber referred to the specific evidence it relied upon, as assessed anew for the purposes of taking its decision under article 60 (2) of the Statute.[167] While the Pre-Trial Chamber voiced its doubts in relation to the utility of reviewing "*ex novo*" whether "reasonable grounds to believe" continue to exist that Mr Mangenda committed the crimes for which he was charged, it stated that it would "nevertheless specifically refer to some of the materials relied upon in issuing the warrant (as well as to their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision".[168] The Appeals Chamber notes that these specific materials included:

> a) translated excerpts of phone calls [*sic*] intercepts between [Mr] Bemba and [Mr] Babala, where [Mr] Mangenda is mentioned in connection with money transfers requested by or made to him (and to [Mr] Kilolo); b) tables containing amounts of money transferred to [Mr] Mangenda by persons including [Mr] Babala and other persons connected to [Mr] Bemba as well as transferred by him. [Footnotes omitted.][169]

75. The Appeals Chamber notes further that the Pre-Trial Chamber also relied upon the Independent Counsel Reports, in which it found that conversations between Mr Kilolo and Mr Mangenda showed that both did, in all likelihood, directly or indirectly, instruct witnesses on the content of their testimony.[170] The Pre-Trial Chamber also cited transcripts of telephone calls between Mr Kilolo and Mr Mangenda that pointed to, *inter alia*, Mr Mangenda's involvement in money transfers to witnesses and their families, and discussion of witness testimony.[171] The Appeals Chamber therefore dismisses Mr Mangenda's argument that "there is no evidence of the alleged procurement of witnesses to give false testimony",[172] insofar as he fails to

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[166] Impugned Decision, para. 5.
[167] *See* Impugned Decision, paras 12-13.
[168] Impugned Decision, para. 9.
[169] Impugned Decision, para. 12.
[170] *See* Impugned Decision, para. 13, referring to Report of 25 October 2013, paragraph 19.a.ii.2.
[171] *See* Impugned Decision, para. 13, referring to the annex of the Report of 25 October 2013, ICC-01/05-64-Conf-Anx, transcripts of phone conversations held on: 26 August 2013, p. 17; 27 August 2013, p. 18; 28 August 2013, p. 19; 30 August 2013, p. 21-22; annex of the Report of 14 November 2013, ICC-01/05-66-Conf-Anx, 29 August, pp. 6-10; annex of the Report of 14 November 2013, ICC-01/05-66-Conf-Anx, pp. 15, 33; ICC-01/05-66-Conf-Anx-Corr, pp. 6-13.
[172] Document in Support of the Appeal, para. 18 (emphasis in original omitted).

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demonstrate that the Pre-Trial Chamber erred in relying upon this evidence in assessing the conditions underpinning article 58 (1) (a) of the Statute.

76. Indeed, at this stage of proceedings, the Appeals Chamber notes that the relevant standard underpinning article 58 (1) (a) of the Statute is the least onerous of the progressively higher evidentiary thresholds required for confirmation of charges under article 61 (7) of the Statute ("substantial grounds to believe" that the person committed each of the crimes charged), or for conviction under article 66 (3) (in which the Court must be convinced of the guilt of the accused "beyond reasonable doubt"). Therefore Mr Mangenda's assertion that the Independent Counsel Reports "contain no concrete proof about [him]"[173] is misguided, as the relevant standard is one of "reasonable grounds to believe", rather than anything more onerous, at this stage. The Appeals Chamber finds this to be also relevant in relation to Mr Mangenda's argument that the Pre-Trial Chamber ought to have verified whether Trial Chamber III has issued a decision in the *Bemba* Case in relation to the allegedly falsified evidence,[174] insofar as, at this stage, the Pre-Trial Chamber need only be satisfied that reasonable grounds exist that Mr Mangenda was connected to such an offence under article 25 (3) (c) of the Statute, rather than being required to engage in an enquiry to verify this further.

77. The Appeals Chamber finds that the Pre-Trial Chamber therefore clearly articulated the evidence it relied upon to support "reasonable grounds to believe" that offences against the administration of justice had been committed by Mr Mangenda, and referred in a specific manner to the evidence in support of the allegations referred to above. In light of this finding, the Appeals Chamber considers that the arguments brought by Mr Mangenda in relation to his second ground of appeal, including those in relation to the transfer of monies,[175] witness coaching,[176] and taking part in privileged telephone calls,[177] amount to a mere disagreement with the Pre-Trial Chamber's findings, and fail to show a clear error therein. The Appeals Chamber

[173] Document in Support of the Appeal, para. 19.
[174] Document in Support of the Appeal, para. 20.
[175] Document in Support of the Appeal, para. 18.
[176] Document in Support of the Appeal, para. 19.
[177] Document in Support of the Appeal, para. 21.

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therefore dismisses Mr Mangenda's assertion that the Impugned Decision "does not specify or establish the 'reasonable grounds'"[178] under article 58 (1) (a) of the Statute.

D. Third ground of appeal

78. Mr Mangenda submits that the Pre-Trial Chamber erred in finding that the conditions under article 58 (1) (b) of the Statute were fulfilled and that his continued detention was necessary.[179] He further argues that the Pre-Trial Chamber erred in finding that, since Mr Mangenda did not propose conditions that could be imposed if he were to be released, conditional release did not have to be considered any further.[180] Mr Mangenda avers that the Pre-Trial Chamber erred in its assessment of the UK's Authorities' Observations and failed to consider humanitarian considerations justifying his interim release.[181] He further adds that the Pre-Trial Chamber failed to address his request for a hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence.[182] The Appeals Chamber will address Mr Mangenda's arguments in turn.

1. Relevant part of the Impugned Decision

(a) Article 58 (1) (b) (i) of the Statute

79. With respect to whether the detention appeared necessary to ensure the appearance at trial of Mr Mangenda, when considering Mr Mangenda's contention regarding his personality and personal circumstances, the Pre-Trial Chamber noted that the "personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is necessary".[183] It added that "[p]ersonal circumstances of education, professional or social status – as those referred to by Mr Mangenda's Defence – are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risks".[184] The Pre-Trial Chamber added that "a suspect's commitment to appear cannot be considered as per se decisive

[178] Document in Support of the Appeal, para. 21 (emphasis in original omitted).
[179] Document in Support of the Appeal, paras 22-29. *See also* Document in Support of the Appeal, para. 30.
[180] Document in Support of the Appeal, para. 30.
[181] Document in Support of the Appeal, para. 30.
[182] Document in Support of the Appeal, para. 31.
[183] Impugned Decision, para. 25.
[184] Impugned Decision, para. 25.

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for the purposes of determining whether one or more of the conditions listed in article 58(1)(b) are met".[185]

80. The Pre-Trial Chamber observed further that "offences against the administration of justice are of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake".[186] It noted that the commission of such offences "undermine[s] the public trust in the administration of justice and the judiciary", and that their seriousness is exacerbated when they are committed "by highly educated individuals", whose "professional mission is to serve, rather than disrupt, justice", such as in the case of Mr Mangenda.[187]

81. The Pre-Trial Chamber noted Mr Mangenda's argument that his identity documents were handed over to the Registry upon his arrest.[188] However, it was of the view that "this does not detract from the persisting existence of a risk of flight not suitable to be effectively mitigated by conditions", given that travel within the Schengen area "can by large occur" without having to show any documents.[189]

82. As for Mr Mangenda's contention that he could not benefit from any external financial assistance to help him abscond, the Pre-Trial Chamber recalled that in the Arrest Warrant Decision it had found that "[Mr] Mangenda's role within the defence team for Mr Bemba would make him part of the latter's broad network and hence the possible beneficiary of the resources available to the network as a whole".[190] The Pre-Trial Chamber also recalled that it had found that Mr Mangenda had been able to establish connections with other members of Mr Bemba's network through the implementation of money transfers.[191] The Pre-Trial Chamber was not convinced that the links established by Mr Mangenda "with various members of that network over the years are now severed by the mere fact of his arrest, or his ensuing withdrawal from the defence team of Mr Bemba's in the [*Bemba*] Case".[192]

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[185] Impugned Decision, para. 26, referring to Application for Interim Release, para. 27.
[186] Impugned Decision, para. 25.
[187] Impugned Decision, para. 25.
[188] Impugned Decision, para. 27.
[189] Impugned Decision, para. 27.
[190] Impugned Decision, paras 28-29.
[191] Impugned Decision, para. 29.
[192] Impugned Decision, para. 29.

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83. The Pre-Trial Chamber further noted that the advanced stage of disclosure in the current proceedings was a relevant factor "in weighing the likelihood of the risk of flight, due to [it] resulting in enhancing the suspect's knowledge of the Prosecutor's case".[193]

84. The Pre-Trial Chamber further found that the "prejudices allegedly entailed by the continued detention of [Mr] Mangenda to his family [were] not a factor relevant for the purposes of the determination under article 60(2) of the Statute".[194]

(b) **Article 58 (1) (b) (ii) of the Statute**

85. In relation to whether detention appeared necessary to ensure that Mr Mangenda does not obstruct or endanger the investigation or the Court proceedings, the Pre-Trial Chamber noted that the material attached to the Application for Warrants of Arrest and the Independent Counsel Reports revealed Mr Mangenda's involvement in Mr Bemba's and Mr Kilolo's "ongoing witness corruption scheme and that money transfers to witnesses were specifically discussed together with and in the context of comments on the developments in the trial of the [*Bemba*] Case".[195] The Pre-Trial Chamber recalled that "[a]s stated by the Prosecutor, [Mr] Mangenda's former role as case manager for the *Bemba* Case entails that he is likely to know the identity of most of the potential witnesses; moreover given the precise information disclosed to him, now he is even in a better position to obstruct or endanger the investigations".[196] The Pre-Trial Chamber added that even if the Prosecutor's investigation is almost completed, "it cannot be reasonably excluded that additional action might be taken, in respect of other evidentiary items which might still be outstanding, whether in relation to the [*Bemba*] Case or to these proceedings, in spite of the fact that some pieces of evidence are indeed in the possession of the Court or of the relevant national authorities and as such beyond the suspects' reach".[197]

86. The Pre-Trial Chamber found that the "[Report of 14 November 2013] contain[ed] elements suitable to signal [Mr] Mangenda's readiness to take action in respect of the ongoing investigation and these proceedings".[198] It noted in that regard

[193] Impugned Decision, para. 31.
[194] Impugned Decision, para. 32, referring to Application for Interim Release, para. 27.
[195] Impugned Decision, para. 34.
[196] Impugned Decision, para. 34 (footnote omitted).
[197] Impugned Decision, para. 34.
[198] Impugned Decision, para. 35.

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that "[o]n 11 October 2013, he inform[ed] [Mr] Kilolo having received information about the existence of an ICC investigation on them both; on 16 October 2013, he seem[ed] to state some concerns about this and receive[d] reassurance from [Mr] Kilolo that he might have 'a solution'".[199]

(c) Article 58 (1) (b) (iii) of the Statute

87. With regard to whether detention appeared necessary to prevent Mr Mangenda from continuing with the commission of offences under article 70 of the Statute, the Pre-Trial Chamber noted that "the nature of the crimes at stake in these proceedings (i.e. offences against the administration of justice) is such as to create a great degree of overlapping between the risk that the investigation be obstructed or endangered and the risk that the commission of the crimes be continued or that related crimes be committed".[200] It stated that, therefore, its observations regarding the risk of Mr Mangenda obstructing or endangering the investigation or the Court proceedings, "are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute".[201]

88. The Pre-Trial Chamber further noted the possibility of the *Bemba* Case being reopened, as happened in the case of the *Prosecutor v. Germain Katanga*, and that "future and related crimes [...] might also be committed by [Mr Mangenda] in respect of [the current] proceedings".[202]

(d) Alleged errors regarding conditions for release

89. The Pre-Trial Chamber noted the UK Authorities' Observations, which stated "the fact that Mr Mangenda is suspected of offences against the administration of justice allegedly committed in connection with the [*Bemba* Case] 'will be taken into account by the competent UK authorities when considering any application for entry clearance or leave to enter the UK (notwithstanding any pre-existing for[m] of entry clearance Mr Mangenda currently holds)'".[203] The Pre-Trial Chamber found that this statement could "hardly be read as signalling willingness and availability on the part

[199] Impugned Decision, para. 35, referring to Report of 14 November 2013, pp. 42-43, 47.
[200] Impugned Decision, para. 36.
[201] Impugned Decision, para. 36.
[202] Impugned Decision, para. 38.
[203] Impugned Decision, para. 42.

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of the United Kingdom to accept the suspect in the event that he were to be released".[204]

90. In the Impugned Decision, the Pre-Trial Chamber noted furthermore that Mr Mangenda did not advance "any specific proposal for release subject to conditions, as an alternative to his detention".[205] In this regard, the Pre-Trial Chamber recalled the Appeals Chamber's holding that "where no proposals for conditional release have been submitted and none are self-evident, 'the Pre-Trial Chamber's discretion is unfettered'".[206]

(e) Alleged failure to address a request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence

91. The Pre-Trial Chamber declined to convene a hearing under rule 118 (3) of the Rules of Procedure and Evidence on the ground that "the abundance of the material available to [the Pre-Trial Chamber], a great amount of which has been referred to in [the Impugned Decision], makes it not necessary or appropriate to hold a hearing at this stage for the purposes of the determination of [Mr] Mangenda's request for interim release".[207]

2. *Mr Mangenda's submissions before the Appeals Chamber*

(a) Article 58 (1) (b) (i) of the Statute

92. Mr Mangenda avers that the Pre-Trial Chamber erred in finding that he could travel within or outside the Schengen area as the Registry has his passport and his Dutch residence permit.[208] According to Mr Mangenda, it is unrealistic to assume that a non-European lawyer could travel in Europe without any identification papers.[209] He adds that "the inability to travel outside the Schengen area is the decisive factor, given that [he] could not seek refuge in non-party States and therefore could be re-arrested at any time if he failed to appear when summoned".[210] He contends further that the Pre-Trial Chamber failed to take into account the fact that travel within the Schengen area would be to visit his wife and children who reside in the United Kingdom, and

[204] Impugned Decision, para. 42.
[205] Impugned Decision, para. 39.
[206] Impugned Decision, para. 40.
[207] Impugned Decision, para. 44.
[208] Document in Support of the Appeal, para. 22.
[209] Document in Support of the Appeal, para. 22.
[210] Document in Support of the Appeal, para. 22.

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that all States concerned are Parties to the Statute, which would ensure his appearance at trial even if he were to abscond.[211]

93. Mr Mangenda further contends that the Pre-Trial Chamber erred in law when it relied on the gravity of the alleged offences, because by doing so the Pre-Trial Chamber "infringed the presumption of innocence, as well as article 58 of the Statute", as gravity is not listed as a criterion under this provision.[212]

94. Mr Mangenda adds that his involvement in a network which could provide him with financial resources to abscond from the jurisdiction of the Court has not been established as the funds he received and their usage were for legal and not for personal reasons.[213]

95. Furthermore, Mr Mangenda avers that the Pre-Trial Chamber committed an error of law in failing to consider his personality as a criterion in its assessment of a risk of flight, and erred in fact by failing to address the fact that he did not have the means or motivation to abscond.[214]

(b) **Article 58 (1) (b) (ii) of the Statute**

96. Mr Mangenda submits that the Pre-Trial Chamber erred when reasoning that when Mr Mangenda "informed Mr Kilolo of an ongoing investigation concerning both of them, adding that this could signal Mr Kilolo's intention to 'take action'", since, according to Mr Mangenda, stating that an investigation is taking place does not imply criminal intent.[215]

(c) **Article 58 (1) (b) (iii) of the Statute**

97. Mr Mangenda argues that the Arrest Warrant Decision merely stated that "'in all likelihood' the 'crimes' continue to date".[216] He submits that the Pre-Trial Chamber erred in fact in responding "by way of hypotheses, asserting for example

[211] Document in Support of the Appeal, para. 26.
[212] Document in Support of the Appeal, para. 22.
[213] Document in Support of the Appeal, para. 23.
[214] Document in Support of the Appeal, paras 24-25, referring to Impugned Decision, para. 25.
[215] Document in Support of the Appeal, para. 27, referring to Impugned Decision, para. 36.
[216] Document in Support of the Appeal, para. 28.

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that the [*Bemba* Case] could be re-opened (which is obviously not the case) and crimes might be committed in respect of these proceedings (which crimes?)".[217]

(d) Alleged errors regarding conditions for release

98. Mr Mangenda submits that the Pre-Trial Chamber erred in law and in fact in stating that the United Kingdom "would not be willing to accept [Mr Mangenda] on its territory" as the "letter in question does not say this".[218] Mr Mangenda argues further that the Pre-Trial Chamber failed to address his need to be with his two children and his wife, who is expecting a third child and that, in these circumstances, the pre-trial detention is "disproportionate" as it puts his family "under a great deal of pressure, both emotional and financial".[219]

99. Mr Mangenda adds that "the law entitles [Mr Mangenda] and his family to live together", and that "[b]y virtue of the presumption of innocence, they cannot be denied this right".[220]

100. Mr Mangenda avers further that the Pre-Trial Chamber erred in law in denying release based on his failure to advance conditions for release.[221] He argues that neither article 60 of the Statute nor rule 119 of the Rules of Procedure and Evidence stipulate that it is necessary to submit conditions, rather, it is "within the Court's discretion to impose such conditions where necessary".[222]

(e) Alleged failure to address a request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence

101. Mr Mangenda submits that the Pre-Trial Chamber did not "respond" to his request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence.[223] He further requests that the Appeals Chamber order such hearing.[224]

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[217] Document in Support of the Appeal, para. 28.
[218] Document in Support of the Appeal, para. 30, referring to Impugned Decision, para. 42.
[219] Document in Support of the Appeal, para. 30 (emphasis in original omitted).
[220] Document in Support of the Appeal, para. 30.
[221] Document in Support of the Appeal, para. 30.
[222] Document in Support of the Appeal, para. 30.
[223] Document in Support of the Appeal, para. 31.
[224] Document in Support of the Appeal, p. 22.

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3. The Prosecutor's submissions before the Appeals Chamber

(a) **Article 58 (1) (b) (i) of the Statute**

102. The Prosecutor submits that Mr Mangenda merely repeats arguments with regard to the flight risks that he previously advanced before the Pre-Trial Chamber.[225] The Prosecutor argues that Mr Mangenda does not demonstrate a discernible error in the Pre-Trial Chamber's finding that he "remained a flight risk" because one may travel within the Schengen area 'without the need [to present] any document'.[226]

103. The Prosecutor underlines that "the gravity of crimes is a relevant factor to consider when assessing the risk of absconding" and that the Pre-Trial Chamber considered this factor in the context of Mr Mangenda's possibility to abscond, which is "consistent with the applicable law".[227] In relation to the argument that article 58 (1) (b) of the Statute does not refer to the gravity of the offence as a relevant factor, she adds that the provision does not "list *any* of the factors that a Pre-Trial Chamber may consider when assessing the risk of absconding".[228]

104. The Prosecutor contends that Mr Mangenda's mere disagreement with the Impugned Decision regarding the establishment of a network of contacts capable of supplying him with funds does not demonstrate an appealable error.[229] She avers that the Pre-Trial Chamber considered several factors which lead to its conclusion, and she recalls that what is required is only the 'possibility, not the inevitability' that Mr Mangenda may rely on his contacts to abscond.[230]

105. The Prosecutor argues further that Mr Mangenda's contention regarding his personal circumstances does not show an appealable error that would materially affect the Impugned Decision.[231]

(b) **Article 58 (1) (b) (ii) of the Statute**

106. The Prosecutor submits that Mr Mangenda's contention with respect to his criminal intent is without merit.[232] The Prosecutor underlines that the Pre-Trial

[225] Response to the Document in Support of the Appeal, para. 14.
[226] Response to the Document in Support of the Appeal, para. 14.
[227] Response to the Document in Support of the Appeal, para. 15.
[228] Response to the Document in Support of the Appeal, para. 15 (emphasis in original).
[229] Response to the Document in Support of the Appeal, para. 17.
[230] Response to the Document in Support of the Appeal, para. 17.
[231] Response to the Document in Support of the Appeal, para. 16.
[232] Response to the Document in Support of the Appeal, para. 18.

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Chamber only found that "there were elements 'suitable to signal' [Mr] Mangenda's 'readiness to take action'".[233] She adds that the Pre-Trial Chamber took into account other factors when concluding that the conditions under article 58 (1) (b) (ii) were fulfilled.[234]

(c) Article 58 (1) (b) (iii) of the Statute

107. The Prosecutor argues that, in accordance with the "well-established jurisprudence" of the Court, the Pre-Trial Chamber correctly assessed "the possibility that future crimes might be committed in the context of the present proceedings", and that as such, "no appealable error was committed".[235]

(d) Alleged errors regarding conditions for release

108. The Prosecutor submits that Mr Mangenda does not show that the Pre-Trial Chamber erred in finding that release was unfeasible given that the United Kingdom did not express willingness to accept Mr Mangenda onto its territory upon release.[236] In that regard, the Prosecutor recalls that the willingness of a State to accept the person concerned as well as to enforce related conditions is necessary.[237] The Prosecutor argues that once the Pre-Trial Chamber is satisfied that the conditions under article 58 (1) (b) continued to be met, Mr Mangenda's contentions regarding his family are not relevant.[238]

109. The Prosecutor argues further that "[c]onditional release can only be considered when risks enumerated in [a]rticle 58(1)(b) exist, if 'the Chamber considers that these can be mitigated by the imposition of certain conditions of release'".[239] She avers that

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[233] Response to the Document in Support of the Appeal, para. 18, referring to Impugned Decision, para. 35.
[234] Response to the Document in Support of the Appeal, para. 18, referring to Impugned Decision, paras 33-35.
[235] Response to the Document in Support of the Appeal, para. 19.
[236] Response to the Document in Support of the Appeal, para. 20.
[237] Response to the Document in Support of the Appeal, para. 20, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 19 August 2011, ICC-01/05-01/08-1626-Red (OA 7), para. 48, quoting *The Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearing with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 2 December 2009, ICC-01/05-01/08-631-Red, para. 106.
[238] Response to the Document in Support of the Appeal, para. 21.
[239] Response to the Document in Support of the Appeal, para. 21.

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Mr Mangenda does not show that the Pre-Trial Chamber erred in finding the continued detention, "as an exceptional measure", was necessary.[240]

(e) **Alleged failure to address a request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence**

110. The Prosecutor submits that the Pre-Trial Chamber has discretion to convene a hearing under to rule 118 (3) of the Rules of Procedure and Evidence, or to not do so.[241] She argues that the Pre-Trial Chamber did respond to Mr Mangenda's request for a hearing and concluded that it was "not necessary or appropriate" to do so.[242]

4. Determination by the Appeals Chamber

(a) **Article 58 (1) (b) (i) of the Statute**

111. With regard to Mr Mangenda's contention regarding his possibility of travelling within or outside the Schengen area, the Appeals Chamber recalls that the Pre-Trial Chamber was aware that Mr Mangenda had handed over his identity documents.[243] However, it noted that "this [did] not detract from the persisting existence of a risk of flight" given that "circulation within the Schengen area can by large occur without the need that any document be shown".[244] The Appeals Chamber considers that the pertinent issue is not whether Mr Mangenda was legally required to be in possession of a travel document when travelling within the Schengen area, but whether he would likely be able to do so without such documents. The Appeals Chamber finds that it was not unreasonable for the Pre-Trial Chamber to conclude that if released to a State within the Schengen area, Mr Mangenda could possibly travel without his identity documents and that this could contribute to a risk of his absconding from the jurisdiction of the Court.

112. The Appeals Chamber finds also no merit in Mr Mangenda's argument that the Pre-Trial Chamber's reliance on the gravity of offences under article 70 of the Statute "infringed the presumption of innocence, as well as article 58 of the Statute", as the gravity is not listed as a criterion under this provision.[245] The Appeals Chamber recalls that it has previously ruled that the gravity of crimes, and the concomitant

[240] Response to the Document in Support of the Appeal, para. 21.
[241] Response to the Document in Support of the Appeal, para. 22.
[242] Response to the Document in Support of the Appeal, para. 22.
[243] Impugned Decision, para. 27.
[244] Impugned Decision, para. 27, referring to Application for Interim Release, para. 19.
[245] Document in Support of the Appeal, para. 22.

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sentence that may be imposed upon conviction, are relevant considerations in assessing the risk that a person may not appear at trial under article 58 (1) (b) (i) of the Statute.[246] Therefore, the Pre-Trial Chamber did not infringe article 58 of the Statute in referring to this factor. The Appeals Chamber finds further Mr Mangenda fails to substantiate his argument regarding the presumption of innocence. Accordingly, his arguments are dismissed.

113. Nevertheless, the Appeals Chamber is concerned by the Pre-Trial Chamber's description of offences against the administration of justice as being "of the utmost gravity".[247] The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be "the most serious crimes of concern to the international community as a whole". The language used by the Pre-Trial Chamber in describing the offences for which Mr Mangenda was charged to be "of the utmost gravity" is therefore problematic, as it may give the impression that the Pre-Trial Chamber accorded undue weight to the seriousness of the alleged offences in assessing the risk under article 58 (1) (b) (i) of the Statute.

114. This notwithstanding, the Appeals Chamber notes that the Pre-Trial Chamber's observation in relation to the gravity of the offences allegedly committed by Mr Mangenda is supported by three reasons: (i) that offences against the administration of justice "threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer"; (ii) that such offences "ultimately undermine the public trust in the administration of justice and the judiciary"; and (iii) that "[s]uch seriousness is only enhanced" when committed by those whose "professional mission is to serve, rather than disrupt, justice".[248] These

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[246] *See Gbagbo OA Judgment*, para. 54; *Mbarushimana OA Judgment*, para. 21; *Bemba OA 2 Judgment*, para. 70; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08 (OA), para. 55; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4) (hereinafter: "*Ngudjolo OA 4 Judgment*"), para. 21; *Lubanga OA 7 Judgment*, para. 136.
[247] *See* Impugned Decision, para. 25.
[248] Impugned Decision, para. 25.

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reasons support the logic that the commission of offences against the administration of justice, as a discrete category, may have specific and serious ramifications on the present case as well as on the administration of justice more broadly. Therefore, given the detailed reasons put forward by the Pre-Trial Chamber for its observations, which are specific to offences under article 70 of the Statute, the Appeals Chamber does not consider that the Pre-Trial Chamber actually sought to equate such offences with those under article 5 of the Statute, despite the language it used. Accordingly, the Appeals Chamber does not find any clear error in this regard.

115. The Appeals Chamber notes that Mr Mangenda also argues that the finding of the Pre-Trial Chamber that his involvement in a network which could provide him with financial resources to abscond the jurisdiction of the Court has not been established, as the funds he received and their usage were for legal and not for personal reasons.[249] In that regard, the Appeals Chamber finds that Mr Mangenda has failed to substantiate his argument and merely disagrees with the Pre-Trial Chamber's finding, without, however, pointing to any specific error of the Pre-Trial Chamber. The Appeals Chamber therefore rejects Mr Mangenda's argument.

116. In relation to Mr Mangenda's contention regarding the Pre-Trial Chamber's failure to address his lack of means or motivation to abscond,[250] the Appeals Chamber notes that the Pre-Trial Chamber addressed Mr Mangenda's arguments regarding his purported lack of means to abscond when making its findings on his connection to Mr Bemba's network.[251] As for Mr Mangenda's stated lack of motivation to abscond, the Appeals Chamber notes that the Pre-Trial Chamber indeed did not expressly address Mr Mangenda's argument. Nevertheless, in the view of the Appeals Chamber, this does not amount to an appealable error. While the provision of sufficient reasoning is important, as previously emphasised by the Appeals Chamber,[252] this does not mean that failure to address in the reasoning of a decision one of the arguments of a party automatically results in an error. Indeed, in respect of the requisite amount of

[249] Document in Support of the Appeal, para. 23.
[250] Document in Support of the Appeal, paras 24-26.
[251] *See* Impugned Decision, paras 28-29.
[252] *Gbagbo OA Judgment*, para. 47; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'", 14 December 2006, ICC-01/04-01/06-773 (OA 5) (hereinafter: "*Lubanga OA 5 Judgment*"), para. 20.

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reasoning in relation to decisions authorising redactions, the Appeals Chamber has explained:

> The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning *will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out*, but it must identify which facts it found to be relevant in coming to its conclusion.[253]

117. In that regard, the Appeals Chamber notes that the Pre-Trial Chamber was "persuaded that the reasons supporting his assessment as to the existence of a flight risk are still outstanding and that the submissions brought forward by [... Mr] Mangenda in this respect are not suitable to weaken their persuasiveness".[254] The Appeals Chamber considers that this indicates that the Pre-Trial Chamber considered Mr Mangenda's argument relating to his purported lack of motivation to abscond, even though it did not address it in its reasoning.

118. In relation to Mr Mangenda's contention regarding the Pre-Trial Chamber's failure to consider his personality and personal circumstances,[255] the Appeals Chamber recalls that the Pre-Trial Chamber noted that the "personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is necessary".[256] It added that "[p]ersonal circumstances of education, professional or social status – as those referred to by Mr Mangenda's Defence – are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risks".[257] The Pre-Trial Chamber also noted that "a suspect's commitment to appear cannot be considered as per se decisive for the purposes of determining whether one or more of the conditions listed in article 58(1)(b) are met".[258]

119. With respect to the relevance of personal circumstances in other courts and *ad hoc* tribunals, the Appeals Chamber observes that the European Court of Human Rights (hereinafter: "ECtHR") has developed an approach to the assessment of the risk of absconding, which does take into consideration the personal and professional

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[253] *Lubanga OA 5 Judgment*, para. 20 (emphasis added).
[254] Impugned Decision, para. 31.
[255] Document in Support of the Appeal, paras 24-26.
[256] Impugned Decision, para. 25.
[257] Impugned Decision, para. 25, referring to Application for Interim Release, para. 21.
[258] Impugned Decision, para. 26.

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circumstances of the suspect, namely, the "person's character, his morals, home, occupation, assets, family ties" in addition to the expected length of the sentence and the weight of evidence.[259] The Appeals Chamber notes further that Chambers of the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY"), in comparable cases, also took into account the suspects' personal circumstances without however according much weight to these factors.[260] Consequently, the Appeals Chamber is of the view that decisions on interim release "ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court". In that regard, "personal circumstances of the suspect such as the suspect's education, professional or social status may be relevant to assessing whether or not a suspect will appear before the Court".

120. In the case at hand, while the Pre-Trial Chamber expressly noted Mr Mangenda's arguments that "his personality [was] beyond reproach and court proceedings ha[d] never been brought against him", the Pre-Trial Chamber's statement that "education, professional or social status" to be "*per se* neutral and inconclusive" is somewhat ambiguous in meaning, and could lead to the conclusion that such personal circumstances were not fully considered.[261] Nevertheless, the Appeals Chamber observes that at paragraph 29 of the Impugned Decision, the Pre-Trial Chamber stated that "[n]one of these elements appears suitable to weaken or otherwise affect the conclusion reached by the [Pre-Trial Chamber] upon the issuance of the [Arrest Warrant Decision]".[262] The Appeals Chamber considers that when making this finding, the Pre-Trial Chamber was referring to, *inter alia*, Mr Mangenda's personality and lack of criminal record, and that therefore his personal circumstances were considered, but not held to be decisive. In this connection, the Appeals Chamber notes that the Pre-Trial Chamber was "persuaded that the reasons

[259] *See, e.g.*, ECtHR, *Aleksandr Novikov v. Russia*, "Judgment", 11 July 2013, application no. 7087/04, para. 46; ECtHR, *Sefilyan v. Armenia*, "Judgment", 2 October 2012, application no. 22491/08, paras 86, 90; ECtHR, *Samoylov v. Russia*, "Judgment", 24 January 2012, application no. 57541/09, para. 107; ECtHR, *Shenoyev v. Russia*, "Judgment", 10 June 2010, application no. 2563/06, para. 54; ECtHR, *Mamedova v. Russia*, "Judgment", 1 June 2006, application no. 7064/05, para. 76; ECtHR, *Becciev c. Moldova*, "Judgment", 4 October 2005, application no. 9190/03, para. 58.

[260] *See, e.g.*, ICTY, Trial Chamber, *Prosecutor v. Astrit Haraqija and Bajrush Morina*, "Decision on Defence application for provisional release of the accused Bajrush Morina", 15 September 2008, IT-04-84-R77.4, para. 9; Trial Chamber, ICTY, *Prosecutor v. Baton Haxhiu*, "Decision on provisional release of Baton Haxhiu", 23 May 2008, IT-04-84-R77.5, para. 11; ICTY, Trial Chamber, *Prosecutor v. Astrit Haraqija and Bajrush Morina*, "Decision on Defence motion for provisional release of the accused Bajrush Morina", 13 May 2008, IT-04-84-R77.4, para. 13.

[261] Impugned Decision, paras 24-25, referring to Application for Interim Release, para. 21.

[262] Impugned Decision, para. 29.

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supporting his assessment as to the existence of a flight risks are still outstanding and that the submissions brought forward by [... Mr] Mangenda in this respect are not suitable to weaken their persuasiveness".[263]

121. Therefore, as reflected in the Pre-Trial Chamber's aforementioned statements at paragraphs 29 and 31 of the Impugned Decision, the Appeals Chamber finds that the Pre-Trial Chamber, albeit in a broad manner, considered Mr Mangenda's personal circumstances, as framed in the Application for Interim Release, in assessing the risks under article 58 (1) (b) (i) of the Statute. Thus, the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's findings in that regard.

(b) Article 58 (1) (b) (ii) of the Statute

122. As to Mr Mangenda's argument that the Pre-Trial Chamber erred in relation to article 58 (1) (b) (ii) of the Statute on the basis that stating that a criminal investigation is underway does not establish criminal intent,[264] the Appeals Chamber finds that Mr Mangenda merely proposes an alternative assessment of the evidence before the Pre-Trial Chamber, without indicating why the Pre-Trial Chamber's approach was unreasonable. Therefore, the Appeals Chamber can discern no clear error in the Pre-Trial Chamber's finding, and accordingly rejects Mr Mangenda's argument.

(c) Article 58 (i) (b) (iii) of the Statute

123. In relation to Mr Mangenda's argument that the Pre-Trial Chamber's finding in relation to article 58 (1) (b) (iii) of the Statute is incorrect because it is based on hypotheses, the Appeals Chamber recalls that it has previously found that the assessment of whether detention appears necessary under article 58 (1) (b) of the Statute "revolves around the possibility, not the inevitability, of a future occurrence".[265] In the case at hand, the Pre-Trial Chamber found that it could not be excluded that the *Bemba* Case be reopened and that the risk that "future and related crimes [...] might also be committed by [Mr Mangenda] in respect to these proceedings".[266] Apart from claiming that the re-opening of the *Bemba* Case was "obviously not the case" and that it was unclear which crimes might be committed in

[263] Impugned Decision, para. 31.
[264] Document in Support of the Appeal, para. 27.
[265] *Ngudjolo OA 4 Judgment*, para. 21.
[266] Impugned Decision, para. 38.

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respect of the current proceedings, he does not advance any reason as to why the Pre-Trial Chamber's holding was unreasonable.[267] Therefore, Mr Mangenda's argument is dismissed.

(d) Alleged errors regarding conditions for release

124. With respect to Mr Mangenda's contention that the Pre-Trial Chamber erred in its interpretation of the UK Authorities' Observations,[268] the Appeals Chamber notes that these observations state that:

> Mr Mangenda is suspected of offences against the administration of justice allegedly committed in connection with the [*Bemba*] Case. This will be taken into account by the competent UK authorities when considering any application for entry clearance or leave to enter the UK (notwithstanding any pre-existing form of entry clearance Mr Mangenda currently holds). This statement in no way pre-judges any decision by UK authorities.[269]

125. The Appeals Chamber recalls that, according to the Pre-Trial Chamber, this observation could "hardly be read as signalling willingness and availability on the part of the United Kingdom to accept the suspect in the event that he were to be released".[270] In the view of the Appeals Chamber, this finding was not unreasonable. While the observations do not explicitly state that the United Kingdom authorities are not willing to accept him, the Appeals Chamber can discern no clear error in the finding that they do not expressly convey their willingness or availability to accept Mr Mangenda should he be released.

126. Turning to Mr Mangenda's argument regarding the Pre-Trial Chamber's failure to consider his need to be with his two children and his wife,[271] the Appeals Chamber notes that Mr Mangenda repeats almost *verbatim* his argument contained in his Application for Interim Release.[272] Mr Mangenda fails to identify any error in the Impugned Decision in this regard; in fact, he merely disagrees with the Pre-Trial Chamber. In any event, the Appeals Chamber notes that the Pre-Trial Chamber considered his argument from the perspective of whether the prejudice entailed by the detention, in particular to his family life, could be a factor in deciding to grant interim

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[267] Document in Support of the Appeal, para. 28.
[268] Document in Support of the Appeal, para. 30, referring to Impugned Decision, para. 42.
[269] Registry Report, Annex III.
[270] Impugned Decision, para. 42.
[271] Document in Support of the Appeal, para. 30.
[272] *Compare* Application for Interim Release, para. 27 *with* Document in Support of the Appeal, para. 30.

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release, and found that it could not.[273] In the view of the Appeals Chamber, any detention of a suspect pending investigation and trial is likely to cause prejudice to the person concerned and to those close to him. It is for that reason that under the Statute, the detention of a suspect is possible only under strict conditions, as set out in article 58 (1) of the Statute. Nevertheless, the prejudice caused is, in and of itself, not a relevant consideration for a determination on interim release. Therefore, the Appeals Chamber does not consider that the Pre-Trial Chamber erred in this regard, and accordingly dismisses Mr Mangenda's arguments.[274]

127. With respect to Mr Mangenda's argument that he was not required to propose conditions for his release and that the Pre-Trial Chamber therefore erred in that regard,[275] the Appeals Chamber finds that Mr Mangenda mischaracterises the Pre-Trial Chamber's finding regarding his failure to submit specific conditions for release. The Appeals Chamber notes that the Pre-Trial Chamber's conclusion is based on the Appeals Chamber's holding in the *Gbagbo OA Judgment* that "where no such proposals for conditional release are presented and none are self-evident, 'the Pre-Trial Chamber's discretion is unfettered'.[276]

128. In the relevant part of the *Gbagbo OA Judgment*, the Appeals Chamber stated:

> [...] if one or more of the risks listed in article 58 (1) (b) of the Statute are present – as in the case at hand – the Pre-Trial Chamber nevertheless has discretion to consider conditional release. In this regard, the Appeals Chamber observes that the Pre-Trial Chamber's discretion to consider conditional release must be exercised judiciously and with full cognizance of the fact that a person's personal liberty is at stake. Thus, in circumstances where a State has offered to accept a detained person and to enforce conditions, it is incumbent upon the Pre-Trial Chamber to consider conditional release. On the other hand, where no such proposals for conditional release are presented and non are self-evident the Pre-Trial Chamber's discretion to consider conditional release is unfettered.[277]

129. In the case at hand, the Pre-Trial Chamber was satisfied that the conditions set forth in article 58 (1) of the Statute were fulfilled. The Appeals Chamber observes that Mr Mangenda only provided alternative addresses of residence, should he be

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[273] Impugned Decision, para. 32, referring to Application for Interim Release, para. 27, which is relevant to Mr Mangenda's need to be with his children and his expecting wife.
[274] *See* Document in Support of the Appeal, para. 30.
[275] Document in Support of the Appeal, para. 30.
[276] Impugned Decision, para. 40, referring to *Gbagbo OA Judgment*, para. 79.
[277] *Gbagbo OA Judgment*, para. 79.

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released, and left it to the Pre-Trial Chamber to impose conditions it "considers expedient".[278] No State had expressly offered to accept him and to enforce conditions.[279] In these circumstances, the Pre-Trial Chamber was not duty-bound to consider conditional release. Rather, it was within its discretion not to consider conditional release. The Appeals Chamber finds therefore that the Pre-Trial Chamber did not abuse its discretion in that regard. Accordingly, Mr Mangenda's argument is dismissed.

(e) Alleged failure to address a request for a hearing under rule 118 (3) of the Rules of Procedure and Evidence

130. The Appeals Chamber finds Mr Mangenda's contention that the Pre-Trial Chamber failed to address his request to have a hearing to be without merit. Contrary to Mr Mangenda's contention, the Appeals Chamber notes that the Pre-Trial Chamber addressed his request and declined to convene such hearing based on the "the abundance of the material available" available before it.[280] Turning to Mr Mangenda's request that the Appeals Chamber order a hearing, he does not advance any argument in support of his request.[281] Accordingly, Mr Mangenda's arguments are dismissed.

VI. APPROPRIATE RELIEF

131. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as no appealable errors have been identified.

Judge Erkki Kourula and Judge Anita Ušacka append dissenting opinions to this judgment.

[278] *See* Application for Interim Release, p. 20.
[279] *See* Impugned Decision, para. 42.
[280] *See* Impugned Decision, para. 44.
[281] The Appeals Chamber notes that Mr Mangenda merely present this request in the relief section of his Document in Support of the Appeal. *See* Document in Support of the Appeal, p. 22.

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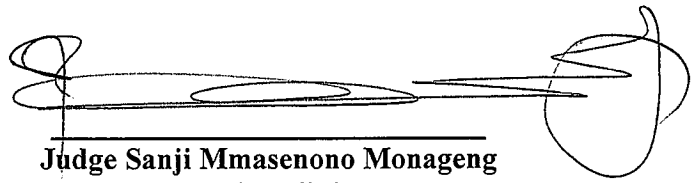

Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 11th day of July 2014

At The Hague, The Netherlands

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Dissenting Opinion of Judge Erkki Kourula

1. I respectfully dissent from the Majority opinion with respect to the findings of the Pre-Trial Chamber in relation to article 58 (1) (a) and (b) of the Statute for the reasons that follow.

2. First, I agree with the Majority's decision to address certain aspects of Mr Mangenda's first and second grounds of appeal together, considering that they raise somewhat overlapping issues relevant to whether the conditions of article 58 (1) (a) of the Statute, i.e. whether there are "reasonable grounds to believe" that Mr Mangenda committed the offences for which he has been charged, continue to be met. With respect to the first ground of appeal as addressed by the Majority, I agree that the fundamental human right to judicial review of the legality of an individual's arrest and detention is "entrenched in article 60 of the Statute" and that, therefore, the remedy of release is available only as provided for in article 60 of the Statute. Accordingly, I also agree that "the principal consideration is not whether a warrant of arrest has been illegally issued, but whether the conditions for detention under article 58 (1) of the Statute are presently met".

3. However, while I would agree that a successful challenge to the legality of an arrest warrant *as such* will not result in the remedy of release once a suspect has been surrendered to the Court, I consider that challenges to the legality of an arrest warrant can nonetheless be relevant to the analysis pursuant to article 58 (1) of the Statute. Whether and to what extent such arguments should be considered will depend on the circumstances of a specific case and the substance of the challenge.

4. In the present case, Mr Mangenda principally challenges the *legality* of the mandate of the Independent Counsel and, following from this alleged illegality, the admissibility of the evidence collected by that Independent Counsel, which was relied upon for the conclusion, pursuant to article 58 (1) (a) of the Statute, in both the Arrest Warrant Decision and indeed the Impugned Decision that there are "reasonable grounds to believe" that Mr Mangenda committed the offences for which he has been charged. In my mind, Mr Mangenda's arguments, and whether they are relevant to an assessment under article 58 (1) of the Statute, must be distinguished from a situation where a suspect attempts to challenge the probative value, reliability, etc. of evidence

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relied upon in an arrest warrant and/or decision on interim release. In the latter situation, I would agree that such determinations should be made within the context of a decision on the confirmation of charges. The core of Mr Mangenda's argument, however, does not directly challenge the evidence as such. Rather, the exclusion of the evidence would be a potential result of a determination on the legality of the Independent Counsel's mandate. Given that a significant amount of the evidence relied upon for the article 58 (1) (a) conclusion could potentially be excluded based on such a *legal* determination, I consider that the legality of the Independent Counsel's mandate is a relevant factor that should have been substantively considered in the Impugned Decision. In this sense, I consider that, absent the ability to raise this legal issue, Mr Mangenda is not able to meaningfully challenge the legality of his arrest and detention nor can a meaningful review thereon be said to have taken place.

5. Furthermore, I do not find persuasive, as a reason not to consider the substance of Mr Mangenda's arguments, the fact that he attempted to appeal the decision appointing the Independent Counsel and was denied leave, as well as requesting reconsideration of that decision, which was also denied. I note in this context that the Pre-Trial Chamber held that, *inter alia*, Mr Mangenda did not have standing because the decision appointing the Independent Counsel was taken in *ex parte* proceedings and therefore Mr Mangenda was not a "party" in the sense of article 82 (1) (d) of the Statute. Without prejudice as to the correctness of these decisions, which are not before us in this appeal, I would simply note that I consider that, once a deprivation of liberty has taken place, all aspects underpinning that deprivation must be subject to challenge and review, regardless of if they could not be challenged at the time they were taken, which was, importantly in my view, *prior* to the deprivation of liberty.

6. For the above reasons, I disagree with the Majority's conclusion, addressed under the second ground of appeal, that it was reasonable for the Pre-Trial Chamber to defer consideration of the mandate of the Independent Counsel until the decision on the confirmation of the charges.

7. In addition to the above, I also find the Pre-Trial Chamber's conclusion to be unreasonable, within the context of the fundamental human right to challenge without

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delay[1] the legality of one's arrest and detention, in the sense that there is no consideration therein regarding the amount of time that could elapse prior to the issuance of a decision on the confirmation of charges. In the context of the confirmation of charges, the fact that the legality of the mandate will be considered and the disputed evidence will be assessed at this later stage of the proceedings does not raise any concerns. However, even though these arguments can be raised and will be decided upon within this different context (confirmation of charges), the time frame for such a decision nonetheless may raise issues within the context of a deprivation of liberty, i.e. detention. In my view, this must be considered and should have been considered in the Impugned Decision. I consider that Mr Mangenda must be able to meaningfully challenge the basis for his continued detention, which can only be done by addressing the legality of the Independent Counsel's mandate, without delay, i.e. through the review provided for in article 60 of the Statute. To hold that a decision on the core of Mr Mangenda's arguments *related to his detention* can be deferred until the confirmation of charges decision is, in my view, unreasonable and raises serious concerns as to whether this delay complies with internationally recognised human rights.

8. Finally, I wish to specifically highlight the length of time that proceedings leading up to a decision on the confirmation of charges routinely take at the Court. In this regard, I also note that the maximum sentence Mr Mangenda could receive, if ultimately convicted, is five years. The reality of deferring a decision on Mr Mangenda's challenge to the legality of the mandate of Independent Counsel until the time of the decision on the confirmation of charges is that Mr Mangenda may have already spent a significant percentage of the *maximum* potential sentence in detention and without having been able to meaningfully challenge the legality of his arrest and detention.

9. With respect to article 58 (1) (b) of the Statute, I agree with the Majority's observations at paragraph 113 of the Judgment that the Pre-Trial Chamber's description of offences against the administration of justice as those "of the utmost

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[1] *See* ICCPR, art. 9 (4), which provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

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gravity" is highly concerning, and that offences under article 70 of the Statute, while undeniably serious, cannot be considered to be as grave as the core crimes under article 5 of the Statute.

10. However, while the Majority considered the Pre-Trial Chamber's treatment of the gravity of the offences to be a discrete issue, in my view, this critically impacted upon the Pre-Trial Chamber's determination of whether the conditions under article 58 (1) (b) (i), (ii) and (iii) of the Statute continue to be met. In my view, the language used by the Pre-Trial Chamber in describing the offences for which Mr Mangenda was charged to be "of the utmost gravity" is an indication that it gave too much weight to the seriousness of the alleged offending in finding that the conditions under article 58 (1) (b) of the Statute continue to be met. This was compounded by the Pre-Trial Chamber's finding that the personal circumstances of Mr Mangenda, such as "education, professional or social status", were "*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks", which I consider to mean that it gave little consideration to these factors. In my view, this is a further indication that the entire weighing exercise under article 58 (1) (b) of the Statute, conducted by the Pre-Trial Chamber, was tainted by its findings in relation to the gravity of the offences, and that it gave too much weight to factors favouring detention over those in favour of release. Indeed, I consider that Mr Mangenda's personal circumstances ought to have been given greater weight, given that the offences for which he has been charged are not at the higher end of the scale of seriousness.

11. Accordingly, I would have reversed the Impugned Decision and remanded the assessment of the grounds for detention under article 58 (1) (a) and (b) of the Statute, in their entirety, to the Pre-Trial Chamber.

Done in both English and French, the English version being authoritative.

Judge Erkki Kourula

Dated this 11th day of July 2014
At The Hague, The Netherlands

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Dissenting Opinion of Judge Anita Ušacka*

1. I respectfully dissent from the decision of the majority of the Appeals Chamber to confirm the Impugned Decision.

2. At the outset, I would like to note that I disagree with the majority's approach to the first ground raised by Mr Mangenda (*see* paragraphs 47 and 48 of the judgment). In my view, Mr Mangenda's arguments in relation to the first ground of appeal should have been rejected *in limine* because they are not properly before the Appeals Chamber. This is because they are essentially challenging the correctness of the Arrest Warrant Decision itself, which, however, is not the subject of the present appeal. If Mr Mangenda had wished to appeal the Arrest Warrant Decision, he should have sought leave to appeal it under article 82 (1) (d) of the Statute,[1] within the relevant time limit.[2] He cannot bring arguments in relation to the Arrest Warrant Decision in an appeal brought under article 82 (1) (b) of the Statute, directed against a decision issued under article 60 (2) of the Statute.

3. Nevertheless, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision. For the reasons that follow, I am of the view that the Pre-Trial Chamber did not consider every part of the relevant applicable law (pursuant to article 21 (1) (a) of the Statute, in the first place, the Statute and the Rules of Procedure and Evidence) and therefore failed to properly interpret the legal framework for its decision when assessing Mr Mangenda's Request for Interim Release. This error taints the Impugned Decision as a whole.

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* Corrected version, issued on 14 July 2014.

[1] I recall in this regard that the Prosecutor sought, and was granted, leave to appeal an arrest warrant decision in the *Al Bashir* case; *see* Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecutor's Application for Leave to Appeal the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", 24 June 2009, ICC-02/05-01/09-29.

[2] *See* rule 155 (1) of the Rules of Procedure and Evidence.

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I. RELEVANT LEGAL FRAMEWORK AND CONTEXT

4. This is one of the first appeals[3] relating to proceedings in respect of offences against the administration of justice under article 70 of the Statute. For that reason, it is convenient to recall the legal framework in that regard.

5. Article 70 (1) (a) to (f) sets out the specific offences against the administration of justice over which the Court shall have jurisdiction. It is noteworthy that the 1994 Draft Statute of the International Law Commission[4] did not give the Court jurisdiction over such offences. Rather, its article 44 (2) provided for an obligation of the States Parties to extend their perjury laws to perjury committed before the Court. The International Law Commission noted that "[t]he statute does not include a provision making it a crime to give false testimony before the court. On balance the Commission thought that prosecutions for perjury should be brought before the national courts".[5]

6. This position changed in the further drafting process of the Rome Statute and it was agreed to give the Court, alongside States, jurisdiction over perjury etc. committed in the proceedings before the Court.[6] However, at the Rome Conference, no agreement could be reached as to the procedure to be applied by the Court in respect of the investigation and prosecution of offences against the administration of justice. In particular, there was a debate as to whether the procedure applicable to the investigation and prosecution of the "core crimes", i.e. the genocide, crimes against humanity, war crimes and the crime of aggression, should also regulate the investigation and prosecution of offences against the administration of justice.[7] For that reason, the decision as to the applicable procedure was left to be decided in the Rules of Procedure and Evidence.[8]

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[3] The other appeals raising the same questions are the appeals *Bemba et al.* OA 2 and OA 3.
[4] International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, UN Doc. A/49/10 (hereinafter: "1994 Draft Statute"), pp. 20 *et seq.*
[5] 1994 Draft Statute, p. 59.
[6] *See* D.K. Piragoff, "Article 70 Offences against the administration of justice", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition), pp. 1337 *et seq.* (hereinafter: "Triffterer-Piragoff, Article 70"), at margin numbers 3-4.
[7] Triffterer-Piragoff, Article 70, margin number 4.
[8] *See* article 70 (2) of the Statute, which provides as follows: "The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court

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7. The Rules of Procedure and Evidence include a separate Chapter 9 on "Offences and misconduct against the Court", the first section of which is devoted to "Offences against the administration of justice under article 70 of the Statute".[9] Rules 162 to 167 contain specific procedural provisions regarding the investigation and prosecution of such offences, which in many respects differ from those applicable to the investigation and prosecution of core crimes. It is only "[u]nless otherwise provided" that the procedural provisions in relation to core crimes also apply to offences against the administration of justice.[10]

8. The drafting process of article 70 of the Statute and the Rules of Procedure and Evidence demonstrates that offences against the administration of justice are not comparable to core crimes. Rather, the Court's jurisdiction over such offences is distinct.[11] Importantly, the gravity of offences against the administration of justice is in no way equivalent to the gravity of core crimes. The latter are, in the words of the Statute's Preamble, among "the most serious crimes of concern to the international community as a whole", amounting to "unimaginable atrocities that deeply shock the conscience of humanity".[12] In contrast, while offences under article 70 of the Statute are undoubtedly directed against an important value – the proper and efficacious administration of international criminal justice – their gravity does not even come close to that of the core crimes.

9. The significant difference in gravity finds expression not least in the relevant provisions regarding the sentences that may be imposed. For core crimes the maximum sentence is 30 years of imprisonment, or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[13] In contrast, for offences under article 70, the maximum sentence is five years of imprisonment or a fine.[14] The difference in gravity also finds expression in

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with respect to its proceedings under this article shall be governed by the domestic laws of the requested State."

[9] On the drafting of this Chapter *see* H. Friman, "Chapter 11 - Offences and misconduct against the Court", in: R. S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 605 *et seq.* (hereinafter: "Friman").

[10] Rule 163 (1) of the Rules of Procedure and Evidence.

[11] *See* Friman, p. 606.

[12] Preamble of the Statute, paras 4 and 2.

[13] Article 77 (1) of the Statute.

[14] Article 70 (3) of the Statute.

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the fact that, while there is no prescription period for core crimes,[15] offences under article 70 of the Statute are subject to a period of limitation of merely five years.[16]

10. In this regard, the practice of the *ad hoc* international criminal tribunals and internationalised courts is also of relevance. It shows that the sanctions imposed for "contempt of court" (the equivalent of "offences against the administration of justice" at the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") and the International Criminal Tribunal for Rwanda) in comparable cases are often relatively lenient.[17] For instance, in the *Tadić* case, in one of the first cases of contempt of court adjudicated before the ICTY, that tribunal imposed a fine of 15.000 Dutch Guilders against the former counsel of Mr Tadić,[18] a decision that was confirmed on appeal.[19] The former counsel was found to have put forward a case on appeal which he knew was false and to have manipulated witnesses; it is noteworthy that he was not placed in detention during the proceedings against him. At the Special Court for Sierra Leone (hereinafter: "SCSL"), an internationalised jurisdiction, in the case of *Independent Counsel v. Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu and Brima Bazzy Kamara,* relating to contempt of court for bribing witnesses or inducing them to recant testimony, the accused were sentenced to prison terms between eighteen months and two years; in relation to one of the accused, the sentence was suspended.[20]

11. Similarly, several national jurisdictions domesticating offences under article 70 of the Statute consider them to be only of moderate or low gravity, as expressed in the maximum sanction. In *Germany*, the relevant offences (perjury etc.) under general

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[15] *See* article 29 of the Statute.
[16] Rule 164 (2) of the Rules of Procedure and Evidence.
[17] At the ICTY, the applicable punishment for "contempt of court" is set out in rule 77 of the Rules of Procedure and Evidence. This rule has undergone several changes. In its original version (IT/32, 14 March 1994), rule 77 (A) provided for imprisonment not exceeding six months or a fine not exceeding 10.000 US Dollars. Both the maximum term of imprisonment and the fine were subsequently augmented. In its current version (IT/32/Rev. 49, 22 May 2013), rule 77 (G) of the ICTY Rules of Procedure and Evidence provides for imprisonment not exceeding seven years or a fine not exceeding 100.000 Euros, or both.
[18] ICTY, *Prosecutor v. Duško Tadić,* Appeals Chamber, "Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin". 31 January 2000, IT-94-1-A-R77.
[19] ICTY, Appeals Chamber, *Prosecutor v. Duško Tadić*, "Appeal Judgement on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin", 27 February 2001, IT-94-1-A-AR77.
[20] Special Court for Sierra Leone, Trial Chamber II, "Sentencing Judgement in Contempt Proceedings", 11 October 2012 (filed 16 October 2012), SCSL-11-02-T; available at: http://www.rscsl.org/Documents/Decisions/Contempt/2011-02/071/SCSL-11-02-T-071.pdf

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criminal law are also applicable if committed before an international court.[21] Most of the relevant offences are classified as "Vergehen", i.e. they are less serious offences carrying a minimum penalty of less than a year of imprisonment or a fine.[22] They are punishable by fines or imprisonment of, depending on the offence in question, a maximum of three to five years.[23] Similarly, in *England and Wales*, the International Criminal Court Act 2001[24] makes the relevant domestic offences applicable if committed before the Court.[25] With respect to perjury, the maximum prison sentence is two years.[26] In *The Netherlands*, domestic provisions on perjury were equally made applicable to cases of perjury before the Court.[27] The maximum sentence here is a term of imprisonment of no longer than six years.[28] The *Italian* Criminal Code includes separate provisions domesticating offences under article 70 of the Statute into Italian law, stipulating maximum prison sentences between three and six years.[29] In *Belgium*, the maximum sentence for offences against the administration of justice is six years of imprisonment.[30] While this is by no means meant to be an exhaustive comparative analysis, and while there are also jurisdictions that provide for higher maximum sentences for the domesticated article 70 offences,[31] the practices in

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[21] *See* section 162 (1) of the German Criminal Code; available at http://www.gesetze-im-internet.de/stgb/.
[22] *See* section 12 of the German Criminal Code.
[23] Sections 153-154, 156, 160-161 of the German Criminal Code.
[24] http://www.legislation.gov.uk/ukpga/2001/17/contents (hereinafter: "United Kingdom ICC Act").
[25] *See* sections 54 and 61 of the United Kingdom ICC Act.
[26] *See* United Kingdom Perjury Act 1911, article 1 (1), available at http://www.legislation.gov.uk/ukpga/Geo5/1-2/6.
[27] *See* The Netherlands, Acts Amending Provisions of the Penal Code, articles 200, 208A, 361, as referred to in G. Sluiter, "The Netherlands", in: C. Kress et al. (eds), *The Rome Statute and Domestic Legal Orders: Constitutional Issues, Cooperation and Enforcement*, Volume II (Nomos Verlagsgesellschaft, 2005), pp. 203 *et seq.* at pp. 229-230.
[28] *See* article 207A of the Dutch Criminal Code; available at http://wetten.overheid.nl/BWBR0001854/TweedeBoek/TitelIX/Artikel207a/geldigheidsdatum_30-06-2014.
[29] *See* articles 368, 371-*bis*, 372, 374-*bis*, 377, 378 and 380 of the Italian Criminal Code; available at http://www.altalex.com/index.php?idnot=36764
[30] *See* article 41 of the *Loi concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux* of 29 March 2004 (entry into force: 1 April 2004), available at http://www.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/4C99B5CC190A33DBC1256EF5004E807F/TEXT/Belgium%20-%20ICC%20Cooperation%20Law%2C%202004.pdf
[31] *See*, for instance, Australia, where perjury before the Court carries a maximum prison sentence of ten years, other offences against the administration of justice carry penalties of imprisonment between five and ten years, *see International Criminal Court (Consequential Amendments) Act*, 2002, para. 268.102 *et seq.*, available at: http://www.comlaw.gov.au/Details/C2004A00993; and Canada, where the domesticated offences under article 70 of the Statute are punishable by maximum prison terms of up to fourteen years, *see* article 16-23 of the Crimes Against Humanity and War Crimes Act, available at:http://laws-lois.justice.gc.ca/eng/acts/C-45.9/page-8.html#h-8.

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Germany, England and Wales, The Netherlands, Italy and Belgium amply demonstrate that those domestic jurisdictions consider offences against the administration of justice not to be of the highest gravity.

12. The above may be summarised as follows: offences against the administration of justice are distinct from core crimes. While they are directed against an important value, they are significantly less serious than core crimes. Under the Rules of Procedure and Evidence, specific procedural rules apply to the investigation and prosecution of such offences, and the procedural rules applicable to core crimes apply only "[u]nless otherwise provided".

II. THE APPROACH IN THE IMPUGNED DECISION

13. Against this background I shall now turn to the approach adopted in the Impugned Decision, which, for the reasons further elaborated below, failed to appreciate the distinct character of offences against the administration of justice.

14. At the outset, it is of note that the Pre-Trial Chamber failed to identify the full legal basis for the Impugned Decision. While the Pre-Trial Chamber referred to articles 58 (1) and 60 (2) of the Statute, it failed to mention, except in passing and indirectly in the section of the Impugned Decision dealing with article 58 (1) (a) of the Statute, that at issue were offences against the administration of justice under article 70 (1) of the Statute and not core crimes.[32] Critically, the Pre-Trial Chamber also failed to refer to, and analyse, rule 163 (1) of the Rules of Procedure and Evidence, without which articles 58 (1) and 60 (2) of the Statute would not even be applicable to the case at hand. This omission is a clear indication that the Pre-Trial Chamber considered Mr Mangenda's Request for Interim Release just as any other request for interim release by a suspect who is alleged to be criminally responsible for core crimes.

15. This is also evidenced by the fact that the Pre-Trial Chamber relied, without any critical analysis, on previous decisions and judgments of the Court – including of the Appeals Chamber – that deal with interim release in the context of alleged core crimes. For instance, the Pre-Trial Chamber referred to, and relied on, judgments of

[32] Impugned Decision, paras 11, 12.

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the Appeals Chamber issued in the *Lubanga* case,[33] the *Gbagbo* case[34] and the *Katanga* case.[35] Yet the suspects in these cases were alleged to have committed crimes against humanity or war crimes – crimes that are, as set out above, in no way comparable to offences against the administration of justice, which Mr Mangenda is alleged to have committed. In addition, several of the suspects were already detained before being surrendered to the Court based on allegations of very serious crimes.

16. Most problematic in the Pre-Trial Chamber's approach is its uncritical reliance on previous judgments of the Court – made in the context of alleged core crimes – when discussing whether the continued detention of Mr Mangenda appeared necessary for any of the three reasons listed in article 58 (1) (b) of the Statute. For instance, as to the risk of the commission of future crimes, the Pre-Trial Chamber referred to a judgment by the Appeals Chamber in the *Gbagbo* case.[36] The Pre-Trial Chamber, however, did not consider whether the fact that in the *Gbagbo* case the "future crimes" at issue were core crimes had any impact on the transferability of the holdings of the Appeals Chamber to the case at hand.

17. In relation to the risk of absconding, at paragraph 30 of the Impugned Decision, the Pre-Trial Chamber noted that "[b]oth the Appeals Chamber and the Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight, because it might indeed facilitate absconding".[37] In the same paragraph, the Pre-Trial Chamber recalled that it had recently found in the *Ntaganda* case that the availability of financial means through a network was a relevant factor in determining whether there was a flight risk. Yet the Pre-Trial Chamber failed to refer to the fact that the offences Mr Mangenda is alleged to have committed carry a significantly lower maximum sentence than core crimes. If the sentencing practice of the ICTY and SCSL is taken as a yardstick, it is likely that, even if Mr Mangenda were found guilty and convicted, the actual sentence imposed could remain significantly below the maximum penalty of five years.

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[33] *See* Impugned Decision, footnotes 18, 19, 39 referring to ICC-01/04-01/06-824, paras 124, 134, 139.
[34] *See* Impugned Decision, footnotes 14, 15, 19, 47, 57 referring to ICC-02/11-01/11-278-Red, paras 23, 26, 27, 49, 70.
[35] *See* Impugned Decision, footnote 41 referring to ICC-01/04-01/07-572, paras 21.
[36] *See* Impugned Decision, para. 54, referring to ICC-02/11-01/11-278-Red, para. 70.
[37] Footnote omitted.

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18. For the above reasons, the principles developed and interpretations adopted in relation to articles 58 (1) and 60 (2) of the Statute in the context of alleged core crimes cannot simply be transferred to the context of alleged offences against the administration of justice. Rather, it has to be carefully assessed whether they are applicable in the specific circumstances of this case, or whether alternative principles and interpretations ought to be developed and adopted. This type of careful analysis is entirely lacking in the Impugned Decision, which contended itself with finding that it would decide Mr Mangenda's "request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber".[38] This gives the impression that based its decision on an inappropriate and improper analogy.[39]

19. Article 21 (2) of the Statute gives the Chambers of this Court the power to "apply principles and rules of law as interpreted in its previous decisions". Yet this must not be done out of context and without a careful evaluation as to whether the previous jurisprudence regarding interim release of suspects alleged to have committed core crimes are actually comparable to the case at hand.[40]

20. I also recall that, pursuant to article 21 (3) of the Statute, the Statute must be applied and interpreted "consistent with internationally recognized human rights". The Impugned Decision rejected Mr Mangenda's request to be released from pre-trial detention, thereby affecting his most fundamental right to personal liberty. When assessing questions of pre-trial detention, a Chamber is obliged to ensure that continued detention is actually justified and reasonable *in the circumstances of the case*. Factors that may be relevant to detention in cases of alleged core crimes may have less or no relevance if considered in the context of offences against the administration of justice. The overarching consideration must always be that

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[38] Impugned Decision, para. 6.
[39] *See* in this regard also article 22 of the Statute, which establishes the principle of legality and, at paragraph (2), specifically prohibits the extension of the definition of a crime by way of analogy.
[40] In this regard, *see Prosecutor v. Laurent Gbagbo,* "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled 'Decision on the "Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo"'", 26 October 2012, ICC-02/11-01/11-278-Red, pp. 37 *et seq.*, "Dissenting Opinion of Judge Anita Ušacka" (hereinafter: "Gbagbo Dissenting Opinion"), para. 13, emphasising that "where a detention decision is at issue that requires a risk analysis based on the facts before the Chamber, this risk analysis may not only be based on abstract factors, but must be supported by concrete evidence and relate specifically to the circumstances of the person who was arrested."

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continued detention is not unreasonable or leads to an arbitrary or disproportionate outcome.[41]

III. CONCLUSION

21. For the reasons set out above, I am of the view that the Pre-Trial Chamber failed to appreciate sufficiently that the matter at hand concerned allegations of offences against the administration of justice and not core crimes. By relying extensively on jurisprudence and the test developed in relation to core crimes, the Pre-Trial Chamber did not give sufficient consideration to the fact that offences against the administration of justice are in no way comparable to core crimes, and that this necessarily impacts on the analysis as to whether continued detention is justified. In addition, the Pre-Trial Chamber's approach bears the inherent risk of undue reliance on abstract factors and formulistic language, as opposed to a proper assessment of the concrete circumstances of the case.[42]

22. In my view, this error of the Pre-Trial Chamber taints the entire Impugned Decision. It is therefore unnecessary to address the further and more detailed arguments raised in Mr Mangenda's Document in Support of the Appeal. As the Pre-Trial Chamber did not consider every part of the relevant applicable law and therefore failed to properly interpret the legal framework for its decision, it could well be that the conclusion it reached was erroneous and that Mr Mangenda should have been released. However, the present appeal is not the opportune occasion to consider the merits of Mr Mangenda's Request for Interim Release. Rather, the Pre-Trial Chamber should reconsider the matter. For that reason, I would reverse the Impugned Decision and remand the matter to the Pre-Trial Chamber for a new decision on Mr Mangenda's Request for Interim Release.

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[41] *See*, for example, European Court of Human Rights, *Khodorkovskiy v. Russia*, "Judgment", 31 May 2011, application no. 5829/04, para. 136; *see* also *Ladent v. Poland*, "Judgment", 18 March 2008, application no. 11036/03, paras 55-56.
[42] *See* Gbagbo Dissenting Opinion, para. 39.

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23. Finally, I would like to recall my separate concurring opinion to the recent decision of the Plenary of Judges on the application for the disqualification of Judge Cuno Tarfusser from the present case.[43] At footnote 11, I stated as follows:

> It is noted that for the purposes of considering the Waiver Application, the Presidency was composed of three Judges of the Appeals Chamber, Judges Song, Monageng and Kuenyehia, which could be problematic for the purpose of future related appeals.

24. I note that in their capacity of being members of the Presidency, these three Judges have issued three decisions that are related to the present case.[44] In light of this fact, I regret that my colleagues did not request to be recused from sitting on the present appeal.[45]

Done in both English and French, the English version being authoritative.

Judge Anita Ušacka

Dated this 11th day of July 2014

At The Hague, The Netherlands

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[43] "Decision of the Plenary of Judges on the Defence Applications for Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-01/13-511-Anx, paras 45-49.

[44] *See Situation in the Central African Republic,* "Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*", 20 November 2013, ICC-01/05-68; ICC-01/05-70-US-Exp (note that no public version of that decision is presently available); and *Prosecutor v. Jean-Pierre Bemba et al.,* "Decision on the 'Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372'", 19 May 2014, ICC-01/05-01/13-407.

[45] *See* article 41 (2) (a) of the Statute, which reads in relevant part as follows: "A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court [...]".

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